

Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial

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Ask any reasonable man on the street, i.e., a consumer, if he thinks it is fair that he is barred from access to the courts when he has a claim based on a form contract which contains an arbitration clause and he will respond with a resounding "No!" The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming the body politic.¹

I. INTRODUCTION

When the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,² ten years ago, it unleashed a torrent that should have focused substantial attention on when enforcement of arbitration agreements may violate the Seventh Amendment jury trial right. Prior to *Gilmer*, arbitration was used primarily in contracts involving two knowledgeable sophisticated parties, in which Seventh Amendment jury trial challenges are less likely to succeed. However, after *Gilmer* made it clear that mandatory arbitration could be imposed on employees,³ and therefore presumably also consumers

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¹ *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

³ See also *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001) (holding that only employment contracts of transportation workers are excluded from coverage of FAA). As a matter of semantics, some defenders of *Gilmer* and its progeny may argue that it is not correct to say that any contractual arbitration clause is either "mandatory" or "imposed." Rather, they might assert that while the company initially drafted the clause, the "little guy" accepted it, making the clause "voluntary." However, as a matter of practical reality, it is a fact that the companies draft the clauses and then use nonnegotiable form contracts to ensure that they are applied to consumers and others. Also, it is simply not true that such clauses are genuinely accepted, knowingly, by consumers or employees. Rather, consumers rarely read much less understand such form contracts. See generally David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 56-58; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q.

and other "little guys," companies increasingly began to use form contracts to impose arbitration in these adhesive contexts on a far more frequent basis.⁴ This phenomenon should have raised the question of whether the adhesive use of binding arbitration unknowingly and involuntarily deprives such "little guys" of their Seventh Amendment jury trial rights.

However, the unfortunate fact is that courts, legislators, policymakers, and the public have paid very little attention to the direct tension between mandatory binding arbitration and the right to a jury trial. When a company uses a form contract to require consumers, employees, borrowers, credit card holders, patients, or other persons to submit claims to binding arbitration, rather than file them in court, the company deprives the individuals of any right they may have had to a jury trial. Everyone agrees that no jury trial is available in arbitration. Nonetheless, relatively few challenges have been made to mandatory arbitration on this ground. When made, such challenges have on rare occasion succeeded.⁵ However, too often they have been shrugged off by the courts without sufficient analysis.⁶

637, 675-77 (1996) (arguing that "genuine" freedom of contract arguments cannot be used to justify "imposing binding arbitration through contracts of adhesion on unwitting consumers.")

⁴ See *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (1997) (Cook, J. concurring) ("The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today's marketplace. As a result, consumers find it increasingly difficult to acquire basic goods and services without forfeiting their rights to try before a jury the common-law claims that may accrue to them."). See also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1031 (2000) (noting increasing proliferation of mandatory arbitration in contracts of adhesion imposed in banking, securities, health care, real estate, employment, and consumer sales contexts).

⁵ See *infra* text accompanying notes 190-98. Note that the Supreme Court subsequently endorsed the use of mandatory arbitration in the consumer context in two cases: *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (holding that the consumer failed to present evidence that arbitration was too costly to be an adequate forum); and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding Alabama statute precluding enforcement of predispute arbitration agreement was preempted in case involving a contract for termite extermination services).

⁶ See *infra* text accompanying notes 199-68. It is not at all clear why this subject has been so neglected. As will be seen, numerous cases discuss the propriety of contractual jury trial waivers. Yet few courts have applied this same analysis to arbitration clauses, even though they also accomplish a jury trial waiver, and even though no good reason has ever been given for not treating arbitration clauses as jury trial waivers. Perhaps this neglect can be attributed, at least in part, to the fact that one significant use of arbitration has been in the collective bargaining context, where arbitration takes the place of the strike, rather than a jury trial. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Yet once one directly confronts the tension between mandatory arbitration and the jury trial right, one sees that it must be taken seriously. While the right to a jury trial available under the U.S. Constitution will not eliminate all mandatory binding arbitration, when applicable the Seventh Amendment should limit companies' ability to impose binding arbitration. The Seventh Amendment will prove particularly important in those cases in which companies draft clauses that are not clear and conspicuous and attempt to impose them on persons who are lacking in knowledge and sophistication. While jury trial rights may also be afforded by federal statutes⁷ and by state constitutions or statutes,⁸ these rights raise distinct issues. This Article will focus only on the federal constitutional right to a jury trial.

The federal Constitutional right to a jury trial has long been deemed one of the fundamental elements of our system of justice. The Seventh Amendment, ratified in 1791, provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved"⁹ The Supreme Court has repeatedly observed that "[t]he

⁷ Juries are, for example, afforded by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (codified in scattered sections of 2 U.S.C.) and by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 192 (1978). In addition, courts sometimes interpret federal statutes that are not explicit to provide for a right to jury trial. For example, the Supreme Court has interpreted the language of the antitrust laws to provide for a jury trial. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959). Jury trial rights that are created by federal statute, rather than the Constitution, raise issues outside the scope of this paper. First, the standard for waiver of such federal rights may be different than the standard for waiving the Seventh Amendment jury trial right. Second, because one federal statute does not clearly "trump" another, as the Constitution defeats inconsistent federal statutes, it would be necessary to reconcile any federal statutory provisions of jury trial rights with the possibly contrary Federal Arbitration Act.

⁸ All fifty states provide for preservation of the jury trial right, in certain kinds of cases, either by constitution or by statute. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999). While some may argue, citing such cases as *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), that state constitutional or statutory jury trial provisions are preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994 & Supp. V 1999) (FAA), I believe this argument is erroneous. As set out in *Casarotto*, the FAA preempts those state provisions that are "applicable *only* to arbitration provisions." *Casarotto*, 517 U.S. at 1656. That is, states may not target arbitration clauses and hold them to higher contractual standards than other types of provisions. However, state constitutions and laws that protect the jury trial right are applicable broadly, and not merely to arbitration contracts. Thus, I believe that where a state provision, for example, requires that any waiver of a jury trial right be "knowing, voluntary, and intelligent," this standard applies to arbitration clauses just as it applies to other contracts. A more complete explication of this argument will not be attempted here.

⁹ U.S. CONST. amend. VII.

trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."¹⁰ The jury trial is valued for its emphasis on common sense,¹¹ its empowerment of the common person,¹² and serving as a check upon the power of the sovereign¹³ and the judge.¹⁴

Admittedly, the Seventh Amendment does not apply to all litigation brought in the United States.¹⁵ While it is well established that the Seventh Amendment applies to actions brought in federal court,¹⁶ it apparently does not apply in state court,¹⁷ and it only applies to cases brought "at common law" for more than twenty dollars.¹⁸ To determine whether a particular suit is "at common law," courts must first perform a historical analysis to decide

¹⁰ *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.)). See also *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

¹¹ See 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 348–50 (7th ed. 1956).

¹² See Sward, *supra* note 8, at 1059–61 (discussing ways in which juries foster values of political participation and deliberation).

¹³ Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1035 (1992).

¹⁴ Sward, *supra* note 8, at 1057–59 (pointing out that the jury is designed to be independent of not only the legislature but also the judiciary). For additional background on the Seventh Amendment, see generally Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

¹⁵ It should be emphasized, however, that state constitutional and statutory rights to a jury trial apply in some of the cases as to which the federal right is not relevant. See *supra* notes 7 & 8.

¹⁶ *Simler v. Conner*, 372 U.S. 221, 222 (1963) (holding federal court sitting in diversity action must apply federal law to determine whether action is "legal" or "equitable" for purposes of right to jury trial).

¹⁷ The Seventh Amendment is one of the very few provisions of the Bill of Rights that has not been "incorporated" into the Fourteenth Amendment Due Process Clause and thus applied to all of the states. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (stating that Seventh Amendment only applies to proceedings brought in federal court). See also *Melancon v. McKeithen*, 345 F. Supp. 1025, 1048 (E.D. La. 1972) (stating, in three judge district court opinion by Judge Wisdom, that Seventh Amendment was not to be applied to state courts), *aff'd sub nom. Mayes v. Ellis*, 409 U.S. 943 (1972), *aff'd sub nom. Davis v. Edwards*, 409 U.S. 1098 (1972). See generally Richard C. Reuben, *ADR and the Troubling Seventh Amendment: A Modern Case for Incorporation* (2000) (manuscript on file with author).

¹⁸ U.S. CONST. amend. VII.

whether the claim would have entitled parties to a jury trial in Eighteenth-Century England.¹⁹ If that historical analysis proves indeterminate, the court is to examine the nature of the remedy that has been sought and provide a jury where the relief sought is "legal" as opposed to "equitable."²⁰ It is clear that some statutory claims can be deemed to be claims "at common law," even though the particular statute did not exist in Eighteenth Century England.²¹

While jury trial rights under the Seventh Amendment are admittedly subject to waiver, waiver is tightly constrained by the following principles: (1) jury trial waivers may not be lightly implied; (2) courts look at a whole host of factors to determine whether the waiver was voluntary, knowing, and intentional; (3) many courts provide that the party seeking waiver bears the burden of proof; (4) courts' holdings render suspect the use of unsigned or uninitialed documents to support the finding of a jury trial waiver; (5) in interpreting purported jury trial waivers, courts have stated that they must be narrowly construed.²² These waiver principles apply in cases between two private parties, and, thus, no "state action" must be proven to show a violation of jury trial rights.²³

How can the body of law which protects the federal constitutional jury trial right be reconciled with a body of arbitration law which often states such propositions as (1) arbitration is favored; (2) arbitration clauses may be upheld absent a showing of voluntary, knowing, or intentional consent; (3) the party opposing arbitration bears the burden of proof; (4) arbitration can

¹⁹ *Tull v. United States*, 481 U.S. 412, 417-21 (1987).

²⁰ *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 563 (1990) (holding plaintiff was entitled to jury trial in statutory "duty of fair representation" action against union and employer, because while historical analysis was indeterminate, back pay remedy sought was essentially legal). *See also Tull*, 481 U.S. at 422-25 (holding party being sued by government under federal Clean Water Act entitled to jury trial because civil penalty of sort provided by Act was traditionally available only in court of law); *Curtis v. Loether*, 415 U.S. 189, 193-96 (1974) (holding party entitled to jury trial where claim was brought under federal fair housing statute because relief sought, actual and punitive damages, was traditionally provided by courts of law).

²¹ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (stating Seventh Amendment applies not only to common law causes of action in existence in Eighteenth Century, "but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action . . .'" (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989))). *See also* cases cited *supra* note 20.

²² *See infra* text accompanying notes 102-08.

²³ The Seventh Amendment on its face does not require state action, and virtually all of the cases discussed in Section II arise between two or more private entities. Nonetheless, at least one court has mistakenly held that state action must be proven to show a violation of the Seventh Amendment. *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999).

sometimes be imposed using unsigned envelope "stuffers," handbooks, and warranties; and (5) ambiguous contracts should be construed broadly to support arbitration?²⁴ Specifically, how can the body of law which protects the constitutional jury trial right be reconciled with arbitration decisions approving clauses contained in hidden fine print, imposed on persons not required to sign or even initial the clause, and particularly when the persons upon whom the clauses are imposed may be uneducated and sorely lacking in bargaining power?

To facilitate the comparison between these two bodies of law, I provide a chart:

Comparison of Courts' Treatment of Contractual Jury Trial Waivers and Arbitration Clauses

| Jury Trial Waivers | Arbitration Agreements |
|--|---|
| 1. Waivers of jury trial rights may not be lightly implied. | 1. Arbitration is favored. |
| 2. Jury trial waivers are acceptable only when they are knowing, voluntary, and intelligent, after considering such factors as the negotiability of the waiver and whether it was actually negotiated, the conspicuousness of the waiver, any disparity in bargaining power between the parties, and the business or professional experience of the party opposing the waiver. | 2. Most courts have held arbitration clauses are valid even when they are not knowing, voluntary, or intelligent. To be valid, most courts state arbitration clauses need not be negotiable, actually negotiated, or conspicuous. Nor is a substantial disparity of bargaining power or expertise usually sufficient to void an arbitration clause. |
| 3. Many courts have held that the party seeking to enforce a jury trial waiver bears the burden of proof. | 3. Courts have generally held that the party opposing an arbitration clause bears the burden of proof. |
| 4. Unsigned and uninitialled waivers are suspect. | 4. Courts have sometimes upheld arbitration clauses contained in unsigned, uninitialled envelope stuffers, employment handbooks, or warranties. |
| 5. Courts hold that jury trial waivers must be narrowly construed, in light of the presumption against waiver of constitutional rights. | 5. Courts have often held that ambiguous arbitration clauses must be interpreted broadly to favor arbitration. |

Most courts have not directly confronted the tension between the cases governing jury trial waivers and those governing arbitration clauses. While the U.S. Supreme Court has generally expressed great enthusiasm for binding

²⁴ See *infra* text accompanying notes 186–87.

arbitration, it has never considered the argument that at least in some contexts, mandatory binding arbitration may violate the right to a jury trial. For example, although the Supreme Court's decision, in *Gilmer v. Interstate/Johnson Lane Corp.*²⁵ held that a securities broker could compel its employees to arbitrate claims brought under the federal Age Discrimination in Employment Act (ADEA), and although sending the case to arbitration at minimum deprived the plaintiff of the statutory jury trial to which he would have been entitled under the ADEA,²⁶ the Court did not address whether mandatory binding arbitration might under some circumstances deprive persons of their Seventh Amendment jury trial right. This lapse is understandable, in that the argument was not presented by plaintiff either in the lower courts or before the Supreme Court.²⁷ Moreover, it is not clear whether or not Mr. Gilmer had a Seventh Amendment right to a jury trial, although it is true that the ADEA statutorily provided him with a jury trial.²⁸

Lower courts' discussions of how jury trial rights can be reconciled with mandatory binding arbitration have been quite puzzling, inconsistent, and even frustrating. Most have entirely ignored the issue, likely in large part because it was not presented to them. A few courts have recognized that a

²⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

²⁶ See 29 U.S.C. § 626(c) (amending statute, in 1978, to add jury trial right). See also *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (holding that there was a statutory right to a jury trial under the ADEA, even prior to addition of explicit right in § 626(c), but failing to address whether the Seventh Amendment would also require that a jury trial be available for claims brought under the ADEA).

²⁷ Plaintiff's counsel did mention, both in his brief and at oral argument, that plaintiff would have had a statutory entitlement to a jury trial of his ADEA claim, absent arbitration. Petitioner's Brief, *Gilmer* (No. 90-18); *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, Oral Argument Transcript, 1991 WL 636282, at *16 (Jan. 14, 1991). However, counsel did not attempt to make an argument to the Supreme Court under the Constitution that the waiver was impermissible. This was probably wise, given that the Fourth Circuit earlier noted that Petitioner "has never asserted that his waiver [of the judicial forum] was anything other than knowing and voluntary. . . ." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990).

²⁸ Although the Supreme Court in *Lorillard* held that the plaintiff had a statutory right to a jury trial for claims brought under the ADEA, it did not address the question of whether plaintiff also had a Seventh Amendment right to a jury trial for such a claim. 434 U.S. at 577. It noted a split in the circuits regarding the availability of a jury trial, under the Seventh Amendment, for ADEA claims. Compare *Morelock v. NCR Corp.*, 546 F.2d 682, 689 (6th Cir. 1976) (holding that because relief sought under ADEA was essentially equitable, Seventh Amendment jury trial right was not available) with *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 838-39 (3d Cir. 1977) (holding suit under ADEA for damages consisting of back wages gave rise to jury trial right under Seventh Amendment), and *Pons v. Lorillard*, 549 F.2d 950, 953 (4th Cir. 1977) (holding that remedies sought under ADEA were equivalent to traditional legal remedies and thus gave rise to jury trial right under Seventh Amendment).

contract to arbitrate waives the jury trial right but have not then explained their failure to apply the traditional jury trial waiver criteria to determine whether or not a waiver should be found.²⁹ Some have simply stated that arbitration is "favored" under federal law while failing to address the possible invalidity of a federal law that is inconsistent with the U.S. Constitution.³⁰ A few courts have offered a most unsatisfying analysis that asserts that, by "agreeing" to arbitrate, persons agree to have their dispute resolved in a non-Seventh Amendment forum, and that the court therefore need not apply normal waiver criteria.³¹ In contrast, a very small number of courts have drawn on jury trial concerns to void arbitration clauses.³² Finally, one court suggested that the tension between the two standards could be resolved by making it easier to enforce contractual waivers of jury trial rights.³³

This Article will address the failure of most courts, attorneys, and commentators to recognize that the Seventh Amendment jury trial waiver standard is applicable in many arbitration cases. Part II will describe the strict analysis courts normally use to determine the validity of contractual jury trial waivers. Part III will then show that courts are not using this strict analysis when they decide arbitration cases, and that they are instead upholding many arbitration clauses that would likely be void under the Seventh Amendment test. Part V will examine how courts reconcile these two sets of doctrines and will argue that there is no defensible rationale for sidestepping or ignoring the traditional Seventh Amendment analysis in those cases that could have been brought in federal court at common law. Finally, Part IV spells out the implications of this analysis for mandatory arbitration. It urges that when a person states a claim to which the Seventh Amendment is applicable, courts must apply the traditional jury trial waiver analysis. Under this analysis courts must refuse to enforce those arbitration clauses that are not accepted voluntarily, knowingly, and intelligently.

²⁹ See *infra* text accompanying notes 199–207.

³⁰ See *infra* text accompanying notes 199–207, 213–23.

³¹ See *infra* text accompanying notes 224–68.

³² See *infra* text accompanying notes 190–98.

³³ See *infra* text accompanying note 209.

II. THE ANALYSIS TRADITIONALLY EMPLOYED TO DETERMINE THE VALIDITY OF CONTRACTUAL WAIVERS OF JURY TRIAL RIGHTS UNDER THE SEVENTH AMENDMENT

A. *Because the Right to Jury Trial is Fundamental, Courts Will Indulge Every Reasonable Presumption Against Waiver*

It is well recognized that many constitutional rights, including the Seventh Amendment right to a jury trial, are waivable. However, the Supreme Court has frequently enunciated that a presumption exists against such waivers. In *Aetna Insurance Co. v. Kennedy*³⁴ the Court stated, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."³⁵

Although *Aetna* involved a directed verdict rather than a contractual jury trial waiver, it is clear that the presumption against waiver is applicable in the contractual context as well. For example, the Supreme Court, in *Fuentes v. Shevin*,³⁶ relied on the *Aetna* language in stating that contractual waivers of due process rights to notice and a hearing may not be lightly inferred.³⁷ In case after case, federal courts considering purported contractual waivers have explicitly stated both that the jury trial right is "fundamental,"³⁸ and that the presumption against the waiver of the jury trial right must be considered in interpreting contractual waivers.³⁹

³⁴ *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

³⁵ *Id.* at 393-94 (holding party did not waive right to have jury resolve factual issues by requesting directed verdict). See also *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (stating "any seeming curtailment of a right to a jury trial should be scrutinized with utmost care").

³⁶ *Fuentes v. Shevin*, 407 U.S. 67 (1972).

³⁷ *Id.* at 94 n.31.

³⁸ E.g., *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D.P.R. 1996); *Coop. Fin. Assoc. Inc. v. Garst*, 871 F. Supp. 1168, 1169 (N.D. Iowa 1995); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 59 (D.R.I. 1993).

³⁹ E.g., *Hendrix*, 565 F.2d at 258 ("It is elementary that the Seventh Amendment right to a jury is fundamental and . . . a presumption exists against its waiver."); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), for proposition that "as the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver"); *Heller Fin., Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672, 1990 WL 77500, *1 (N.D. Ill. May 31, 1990) ("The right to a jury trial is fundamental and courts will indulge every reasonable presumption against waiver."); *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 594-96 (N.D. Ill. 1989) (quoting *Aetna*, stating that "as the right of jury

B. *Contractual Waivers of Jury Trial Rights are Permissible Only
When the Waiver is Knowing, Voluntary, and Intentional*

While the Supreme Court has never enunciated the precise standard courts should employ in reviewing contractual jury trial waivers,⁴⁰ lower courts have virtually uniformly held that such waivers are only valid when they meet a high standard variously expressed in words such as knowing, voluntary, and intentional. For example, in the leading case of *National Equipment Rental, Ltd. v. Hendrix*,⁴¹ the Second Circuit stated, "it is elementary that the Seventh Amendment right to a jury trial is fundamental and that its protection can only be relinquished knowingly and intentionally."⁴² Other federal courts have upheld contractual waivers only where they were "knowing and intentional,"⁴³

trial is fundamental, courts indulge every reasonable presumption against waiver," but still upholding contractual waiver given factual context).

⁴⁰ The Supreme Court has consistently employed the "knowing, voluntary, intentional standard" for waivers of constitutional rights in the criminal context. *E.g.*, *Brady v. United States*, 397 U.S. 742, 748 (1970) (stating, in case involving purported waiver of right to trial due to guilty plea, that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"). However, the Court has left open the possibility that waiver standards might be somewhat different in the criminal and civil contexts. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (holding that even assuming a "voluntary, knowing, intelligent" test applied, contractor had waived its due process rights to notice and a hearing). *See also* *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (stating that regardless of what waiver standard applies in civil context, it was not met, in that "[w]e need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.") In both *Fuentes* and *Overmyer* the Court did, however, emphasize the relevance of such factors as clarity and conspicuousness of the waiver, disparity in bargaining power, the process of negotiation, and the fairness of the bargain. For a more detailed discussion of *Overmyer* and *Fuentes* see Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 50-63 (1997). *See also* Reuben, *supra* note 4, at 1020-30.

⁴¹ *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977).

⁴² *Id.* at 258 (holding that lessee did not waive trial by jury where waiver provision in contract was "set deeply and inconspicuously" in the agreement, and where lessee "did not have any choice but to accept the . . . contract as written if he was to get badly needed funds").

⁴³ *E.g.*, *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (citing, favorably, standard that permits waiver of fundamental jury trial right that is knowing and intentional, while going on to uphold waiver in commercial loan); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (stating, in upholding waiver in

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"knowing, voluntary and intentional,"⁴⁴ "knowing, voluntary and intelligent,"⁴⁵ "voluntary and intentional,"⁴⁶ "knowing and intentional,"⁴⁷ "knowing and intelligent,"⁴⁸ or "knowing and voluntary."⁴⁹ The courts have not drawn any distinctions based on the slight differences in the wording of these phrases.⁵⁰

commercial lease, that the "[S]eventh [A]mendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract").

⁴⁴ *E.g.*, *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Col. 1982) (rejecting waiver in franchise agreement and stating "defendants have a very heavy burden of proving that the plaintiffs knowingly, voluntarily and intentionally agreed upon the jury waiver provisions A constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract").

⁴⁵ *E.g.*, *Phoenix Leasing, Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (upholding contractual jury trial waiver in commercial context); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 59 (D.R.I. 1993) (upholding waiver secured in commercial loan transaction).

⁴⁶ *E.g.*, *Nat'l Westminster Bank v. Ross*, 130 B.R. 656, 667 (S.D.N.Y. 1991) (enforcing jury trial waiver contained in commercial loan document).

⁴⁷ *E.g.*, *Oei v. Citibank N.A.*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997) (holding that letter of credit applicant in commercial transaction had waived jury trial right); *Luis Acosta Inc. v. Citibank N.A.*, 920 F. Supp. 15, 18-19 (D.P.R. 1996) (holding that commercial lender failed to meet burden of showing waiver was knowing and intentional); *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 910-11 (S.D.N.Y. 1995) (holding that passenger did not waive right to bring jury trial claim against ship operator although back of ticket contained waiver provision).

⁴⁸ *E.g.*, *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (upholding waiver on grounds that it was knowing and intelligent).

⁴⁹ *E.g.*, *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756-58 (6th Cir. 1985) (applying "knowing and voluntary standard," found to be "overwhelmingly" used to determine validity of contractual waivers, to conclude that oral representation at time of contracting voided written waiver); *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 602 (S.D.N.Y. 1999) (upholding waiver in commercial loan context held to be knowing and voluntary); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 706 (E.D. La. 1999) ("Waiver [of the jury trial right] requires only that the party waiving such right do so 'voluntarily' and 'knowingly' based on the facts of the case.").

⁵⁰ *See K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755-56 (6th Cir. 1985) (treating as synonymous alternative phrasings of "knowingly, voluntarily and intentionally" and "knowing and voluntary"). *K.M.C.* also explains the superficial inconsistency between case law that permits inadvertent waiver of a jury trial, once an action has been commenced, and case law that requires contractual jury trial waivers to be knowing and intentional:

[W]e were initially troubled by the apparent inconsistency between application of a knowing and voluntary standard to contractual waiver of jury trial, and waiver by mere inadvertence under Fed. R. Civ. P. 38(d), which provides that

C. To Determine Whether Waivers are Knowing, Voluntary, Intentional, and Intelligent, Courts Typically Look at a Series of Overlapping Factors

While courts have not adopted an identical phrasing of the factors to be considered in examining contractual jury trial waivers, there is substantial agreement regarding what kinds of information is relevant. Courts typically consider any actual negotiations over the clause, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the degree of bargaining disparity between the parties, and the experience and sophistication of the party opposing the waiver.⁵¹ Courts have not been explicit as to how these factors relate to one another, but seem to consider them all together. Thus, it is not necessary to make a strong showing on all of the factors to uphold a jury waiver clause.⁵² Equally, it is not necessary to

failure to file a timely demand constitutes waiver of trial by jury We are convinced, however, that there is a sound rationale underlying the application of different standards in the two instances. There is a significant distinction to be drawn between a contractual waiver entered into before any cause of action has arisen, and a party's procedural default once litigation has commenced in a particular case.

Id. at 756 n.4.

⁵¹ *E.g.*, *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 603-04 (S.D.N.Y. 1999) ("The factors a court must consider in determining whether a contractual waiver of a right to a jury trial was entered into knowingly and voluntarily include: 1) the negotiability of contract terms and negotiations between the parties concerning the waiver provision; 2) the conspicuousness of the waiver provision in the contract; 3) the relative bargaining power of the parties; and 4) the business acumen of the party opposing the waiver."); *Oei v. Citibank*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997) ("In addressing jury waiver clauses, courts have consistently examined the following factors: negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision."); *Luis Acosta, Inc. v. Citibank*, 920 F. Supp. 15, 18 (D.P.R. 1996) (in determining whether waiver was knowing and intentional courts look to "whether the waiver clause was set forth in bold and conspicuous lettering, or whether instead it was buried deep in the contract," "whether the parties are sophisticated enough to have comprehended the import of the language contained in the waiver," "whether or not the parties were represented by counsel at the time of contracting," and "whether there is a gross inequality in bargaining power between the parties"); *Coop. Fin. Ass'n v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (stating that in determining the validity of a jury trial waiver courts "have considered whether the waiver provision is on a standardized form agreement or newly-drafted document, in fine print or in large or bold print, set off in a paragraph of its own, in a take-it-or-leave-it or negotiated contract, and the length of the contract").

⁵² *See, e.g.*, *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 60-61 (D.R.I. 1993) (upholding jury trial waiver, despite imposition through a standard form which borrower

make a strong showing on all of the factors to defeat a jury waiver clause.⁵³ Given these standards, courts uphold many jury trial waivers, particularly those imposed in a commercial context.⁵⁴ However, when the consideration of these factors show that the waiver was not entered voluntarily, knowingly, and intelligently, as is more often the case outside the commercial context, courts refuse to enforce the jury trial waivers. The following sections show how courts have analyzed each factor.

1. *Negotiability of the Waiver*

In determining whether or not to enforce a jury trial waiver courts examine both any negotiations that did take place regarding the clause, and also whether or not the clause was presented on a take-it-or-leave-it basis. When the clause was actually the subject of negotiation, courts are more likely to uphold the waiver, reasoning that the clause was at least accepted knowingly.⁵⁵ The fact that a clause was not negotiated will not necessarily be

was required to sign to get loan, given the degree of sophistication of the party opposing waiver, the absence of an extreme bargaining disadvantage or gross disparity in bargaining power, and the fact that the clause was not inconspicuous); *Orix Credit Alliance, Inc. v. Better Built Corp.*, No. 89 CIV. 7333 (JFK), 1990 WL 96992, at *2 (S.D.N.Y. July 2, 1990) (upholding jury trial waiver, although waiver opponents claimed they were unaware of consequences of document, were not represented or advised by counsel, and understood that they had no choice but to execute the documents where opponents were business persons, where waiver was not buried in long agreements, and where opponents could have chosen not to sign agreements).

⁵³ See, e.g., *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18-19 (D.P.R. 1996) (rejecting waiver although borrower was a shrewd and experienced businessman, because lender failed to provide evidence of "the parties' specific negotiations over the waiver, the conspicuousness of the provision, [and] the parties' relative bargaining power"); *AAMCO Transmissions, Inc. v. Marino*, Nos. 88-5522, 88-6197, 1990 WL 10024, at *2 (E.D. Pa. Feb. 7, 1990) (rejecting clause, imposed on take-it-or-leave-it basis, even though franchisees certainly had knowledge of the clause and even though there is no evidence they either objected to the clause or even had any qualms about it).

⁵⁴ Note that the Georgia Supreme Court, however, has held that all predispute agreements to waive a jury trial are unenforceable under the Georgia Constitution and statutes. *Bank South N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994). See also *Am. S. Fin., Ltd. v. Yang*, 448 S.E.2d 450 (Ga. 1994) (holding same). Interestingly and inexplicably, this prohibition has not been applied to arbitration clauses. *Bank South N.A.*, 444 S.E.2d at 800 n.5 (citing statute governing enforcement of arbitration provisions).

⁵⁵ E.g., *Okura & Co. v. Careau Group*, 783 F. Supp. 482, 489 (C.D. Cal. 1991) (observing that court previously upheld clause in part because provisions "had been negotiated by the parties and were an essential aspect of the parties' bargain"); *N. Feldman & Sons, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (upholding waiver in part because contract as a whole "was the result of years of negotiation between

used to void the waiver, however, where the court finds evidence, such as negotiation over other clauses, showing that it could have been negotiated.⁵⁶

Courts also examine the discussions, if any, surrounding inclusion of the clause. They are more likely to uphold clauses that were accurately explained.⁵⁷ At the same time, they are more likely to reject clauses that are inaccurately explained. In *K.M.C. Co. v. Irving Trust Co.*⁵⁸ the Sixth Circuit affirmed a district court's refusal to enforce a contractual jury trial waiver, because the party opposing waiver submitted evidence showing that the company president was told by a representative of the defendant, prior to signing the agreement, that absent fraud the jury trial waiver would not be enforced.⁵⁹ In these circumstances, held the Sixth Circuit, the waiver could not be said to be either knowing or voluntary.⁶⁰

Courts are also more likely to reject waivers that were not specifically discussed or bargained for. In *Dreiling v. Peugeot Motors of America*,⁶¹ the federal district court refused to enforce a jury trial waiver contained in the Peugeot Dealer Agreement. In doing so the court emphasized that

the parties"). Cf. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (upholding confession-of-judgment clause in part because clause was actually negotiated by company and its attorney, in return for consideration).

⁵⁶ E.g., *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 707 (E.D. La. 1999) (upholding waiver and stating "[a]lthough the terms of the contracts were not negotiated, there is no indication that the terms were not negotiable," particularly given that dealer had previously negotiated certain contractual terms with owner); *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999) (stating "[s]imply because the Cranes did not attempt to negotiate its provisions does not mean that, in fact, the waiver or other terms in the note were not negotiable," and emphasizing that borrower had in fact negotiated changes in prior transaction with same lender); *Oei v. Citibank*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997) (enforcing jury waiver clause contained in letter of credit application agreement, even though the provisions were not negotiated and were created by the lender, because there was no reason to believe the clause was not negotiable). The *Oei* court explained, "[t]he Application Agreement was not like a ticket sold to a passenger boarding a cruise ship Second, there was little disparity in bargaining power. Oei was Citibank's longtime customer . . . and Citibank had an interest in accommodating him." *Id.*

⁵⁷ See, e.g., *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (upholding clause imposed on franchisees, in part because franchisor had discussed the waiver with the franchisee during a board of review hearing, which discussion is quoted by the court).

⁵⁸ *K.M.C. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985).

⁵⁹ *Id.* at 758.

⁶⁰ 757 F.2d at 757. The court rejected the argument of the party defending the waiver that the parole evidence rule should be used to exclude evidence regarding the conversation. *Id.*

⁶¹ *Dreiling v. Peugeot Motors of Am.*, 539 F. Supp. 402 (D. Col. 1982).

"[d]efendants have presented no evidence that the waiver provision was a bargained for term of the contract, was mentioned during negotiations, or was even brought to the plaintiffs' attention."⁶²

Courts have also shown a willingness to reject waivers which are contained in form agreements and, thus, definitely or likely not subject to negotiation. Courts reason that such clauses are less likely to be either knowing or voluntary.⁶³ For example, in *AAMCO Transmissions, Inc. v. Marino*,⁶⁴ the district court denied a franchiser's motion to dismiss its franchisees' demand for a jury trial reasoning that franchisees "did not voluntarily waive their right to a jury trial."⁶⁵ Although each of the four franchisees had stated they had read and understood the franchise agreement,⁶⁶ and although three of the four "were specifically advised that the franchise agreement contained a jury trial waiver provision,"⁶⁷ the court emphasized that the clause was presented as non-negotiable.⁶⁸

⁶² *Id.* at 403. See also *Luis Acosta Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting waiver in part because lender presented no evidence as to parties' specific negotiations over the waiver); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) ("The absence of specific discussions or negotiations concerning the jury waiver provision militates against a finding of waiver."); *Heller Fin., Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672 1990 WL 77500, at *2 (N.D. Ill. May 31, 1990) (rejecting jury trial waiver contained in commercial loan agreement, based in part on observation that clause was not negotiated).

⁶³ In *Dreiling v. Peugeot Motors of America*, 539 F. Supp. 402, 403 (D. Col. 1982), the court refused to enforce a waiver in part because it was contained in a form contract. "The 1978 Agreement appears to be Peugeot's standardized printed dealer contract, drafted by Peugeot. Obviously, the plaintiffs had little, if any, opportunity to negotiate the provisions. Absent proof to the contrary, such an inequality in relative bargaining positions suggests that the asserted waiver was neither knowing nor intentional." *Id.* at 403. See also *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 911 (S.D.N.Y. 1995) (refusing to enforce a jury trial waiver contained as paragraph 8 of a cruise ticket); *Heller Fin., Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672 1990 WL 77500, at *2 (N.D. Ill. May 31, 1990) (rejecting jury trial waiver contained in commercial loan agreement and stating "[w]here the waiver provision is set out in an unnegotiated form contract that is not susceptible to negotiation, it is presumed that there was not a knowing waiver of the right to a jury trial").

⁶⁴ *AAMCO Transmissions, Inc. v. Marino*, Nos. 88-5522, 88-6197, 1990 WL 10024 (E.D. Pa. Feb. 7, 1990).

⁶⁵ *Marino*, 1990 WL 10024, at *2.

⁶⁶ *Marino*, 1990 WL 10024, at *1.

⁶⁷ *Marino*, 1990 WL 10024, at *1.

⁶⁸ "It is uncontested that the franchise agreement was presented to each franchisee/defendant as a non-negotiable 'take-it-or-leave-it' proposition. AAMCO told defendant Lopes that the terms of the franchise agreement were 'locked in concrete,' and were not subject to negotiation." *Marino*, 1990 WL 10024, at *2. Thus, concluded the court, "[i]n essence each defendant was compelled to sign the franchise agreement as

Yet, mere non-negotiability of a clause is not always sufficient to void a jury trial waiver. In *Bonfield v. AAMCO Transmissions, Inc.*,⁶⁹ the court upheld a non-negotiable clause, explaining that although the franchisee could not have changed the clause, he was perfectly free to reject the deal in its entirety.⁷⁰ In *Smyly v. Hyundai Motor America*,⁷¹ the court went much further. In an unusual decision, it upheld a clause that was not noticed by a dealer in part because the court found that even had the dealer noticed and protested the clause, the manufacturer likely would not have negotiated it, and the dealer likely would not have refused to be a dealer solely because of the jury trial provision.⁷²

2. Conspicuousness of the Waiver

Courts have frequently concerned themselves with the clarity and conspicuousness of the waiver, reasoning that an inconspicuous clause was not likely agreed to knowingly or intentionally.⁷³ The conspicuousness of the clause depends upon such things as font size, typeface, and placement. Courts are more likely to uphold waivers that are displayed in large typeface, bold, or capital lettering.⁷⁴ They are also more likely to uphold waivers that

presented if he wanted to acquire an AAMCO franchise." *Marino*, 1990 WL 10024, at *2. ("It is understandable that a national franchiser would feel compelled to treat all franchisees uniformly and insist on standard franchise agreements. Further, there is no evidence that any of the defendants objected to or even had any qualms about the waiver provision of which they certainly had knowledge. On the record in this case, however, it is clear that the defendants possessed virtually no bargaining power and that the waiver provision was not subject to negotiation.").

⁶⁹ *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589 (N.D. Ill. 1989).

⁷⁰ *Id.* at 596 ("It is true that Cades specifically told Bonfield AAMCO would accept no changes in the contract. But, AAMCO's stated unwillingness to accept contract changes—its 'take it or leave it' position—does not vitiate Bonfield's waiver. Nothing compelled him to accept AAMCO's franchise—he was perfectly free to reject the deal.") *See also* *Coop. Fin. Ass'n v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (stating that although party seeking jury trial asserts "he was compelled by family considerations to enter into the agreement," such allegations "do not negate his ability to review and negotiate the terms of the agreement, [in that t]here is no evidence that [he] could not have sought renewal or replacement financing elsewhere if he had objected to the terms of CFA's loan").

⁷¹ *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428 (D. Mass. 1991).

⁷² *Id.* at 430.

⁷³ *See, e.g., Luis Acosta, Inc. v. Citibank N.A.*, 920 F. Supp. 15, 18 (D.P.R. 1996) (stating that although fundamental jury trial right may be waived, waiver "must be clear and unequivocal").

⁷⁴ *E.g., Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 708 (E.D. La. 1999) (upholding jury trial waiver contained in agreement between

are placed in a key location, such as near the signature line of the agreement.⁷⁵ At a minimum, courts usually look to see that the typeface was not particularly small, and that the clause was not buried in a long agreement.⁷⁶ In contrast, courts are more likely to reject clauses that are printed in small type, or buried in a long agreement.⁷⁷ Courts have also

automobile dealership and its owners, in part because clauses "were clearly written, in most instances in block print, just above the signature line"); *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999) (upholding waiver deemed to be "quite conspicuous" in part because it "was written in all capital letters"); *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1383 (D. Nev. 1994) (upholding jury trial waiver in part because it was printed in capital letters, and placed as last paragraph above the signature line).

⁷⁵ *E.g.*, *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999) (upholding waiver in commercial loan deemed to be "quite conspicuous" in part because it was located "on the signature page itself, . . . immediately preced[ing] the . . . signatures"); *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997) (enforcing jury waiver clause contained in letter of credit application agreement, where waiver was "highly conspicuous" in that it was "set off in its own paragraph, right above the signature line"); *Coop. Fin. Ass'n v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (upholding waiver contained in contract between commercial ranch owner and lender, where clause was "set off in its own paragraph, in type identical to that of every other provision of the loan agreement," and where clause was placed "near the end of a [four page] document just before the signatures and just before a warning to read the entire document").

⁷⁶ *See, e.g.*, *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (upholding jury trial waiver contained in agreement for lease of oil drilling rig, where parties to agreement were both "sophisticated" and where the provision "was in the normal print size of the contract"); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (upholding jury trial waiver contained in commercial lease agreement that was just two pages long, even though waiver was not set off in a separate paragraph and even though it was "in the ninetieth line of print and is in the middle of a thirty-eight line paragraph"); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 60-61 (D.R.I. 1993) (upholding jury trial waiver in commercial loan, even though the clauses "were not set out in their own paragraphs or written in bold print," because here the agreements were only four pages long, contained just three pages of text, the language of the waiver was clear and definite, the waiver clauses were located at the end of a paragraph, the waiver clause was located just two inches above the signature line, and the clauses were set out in print that was entirely legible and no smaller than the rest of the print in the document).

⁷⁷ *E.g.*, *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (rejecting validity of jury trial waiver in commercial lease, where provision was "literally buried in the eleventh paragraph of a fine print, sixteen clause agreement," noting that the clause "was set deeply and inconspicuously in the contract," and noting that it is not credible that laymen would have known or even suspected the meaning of the clause); *Luis Acosta, Inc. v. Citibank*, 920 F. Supp. 15, 19 (D.P.R. 1996) (rejecting clause not shown to be conspicuous in commercial loan, particularly given that "the waiver clause is not in boldface and is buried at the end of the contract"); *Hydramar, Inc. v. Gen. Dynamics Corp.*, Civ. A. No. 85-1788, 1989 WL 159267, at *4 (E.D. Pa. Dec. 29, 1989) (rejecting jury trial waiver contained in commercial contract as too inconspicuous).

rejected clauses that were relatively conspicuous, on the ground that mere conspicuousness was not enough to show the waiver was knowing and voluntary.⁷⁸

3. Disparity of Bargaining Power Between the Parties

Courts consider an array of facts in determining whether a jury trial waiver is invalid due to a disparity of bargaining power. When a party essentially had no choice but to sign the agreement, perhaps because the party was in desperate financial straits, some courts have held that the waiver is void, essentially finding that the waiver was not voluntary.⁷⁹ Further, as noted above in the section on "negotiability," courts are more likely to reject clauses contained in form agreements, that were therefore not subject to

because it was contained in thirty-fourth section of a twenty page document which was itself merely referenced, together with other documents, in purchase order signed by plaintiff); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Col. 1982) (rejecting jury trial waiver in contract between automobile dealer and manufacturer, and stating "[a] constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract"). *But see Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 428-30 (D. Mass. 1991) (upholding jury trial waiver, even though it was contained on page twenty-nine of "standard terms" which were not provided to dealer until after he had agreed to accept terms, where clause was noted in table of contents of standard terms, and where dealer was sophisticated businessman who failed to inquire about standard terms, and where court found that dealer would not have rejected contract had he been aware of jury trial waiver provision).

⁷⁸ *E.g.*, *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (rejecting clause that was printed in capital letters, because "it was not so conspicuous as to insure a knowing and voluntary waiver"); *Heller Fin. Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672, 1990 WL 77500 (N.D. Ill. May 31, 1990) (refusing to enforce waiver in commercial lease that was "found on the last page of a five-page contract, seven lines above the signature block," on grounds that it was part of unnegotiated form contract, as well as that the jury trial waiver was not so obvious that it must have been known to the signatory of the agreement).

⁷⁹ *E.g.*, *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (rejecting jury waiver provision in part because it was clear borrower "did not have any choice but to accept the NER contract as written if he was to get badly needed funds"); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (rejecting waiver in part because there was unequal bargaining power in that borrower's company "desperately needed an infusion of cash"). *Cf. In re Reggie Packing Co.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (upholding jury trial waiver, even though borrower argued that company desperately needed financing and that lender was only available source of credit at time of loan, where court found that borrower was assisted by an attorney and where borrower had been successful in altering several contractual provisions).

negotiation.⁸⁰ In *Sullivan v. Ajax Navigation Corp.*,⁸¹ the district court refused to enforce a jury trial waiver contained on the back of a cruise ship ticket. It stated,

[D]efendant has not sought to prove, other than by referring to the placement and font size of the waiver clause, that the non-purchasing plaintiff⁸² was aware that she was relinquishing a constitutional right at the time she boarded the cruise ship. The contract, with its standardized language, was drafted by the defendant. Further, it was non-negotiable; plaintiff had no choice other than to accept the contract as written. Absent proof to the contrary, such an inequality in relative bargaining positions suggests that the asserted waiver was neither knowing nor intentional.⁸³

On the other hand, when both parties were relatively sophisticated businesses, many courts have been more willing to enforce the waiver, finding it sufficient even if there was not absolute equality of bargaining power.⁸⁴ Several courts have emphasized that a company often has the option simply not to complete the transaction to which a jury trial waiver is attached.⁸⁵ When a relatively weak party is represented by an attorney, some courts have found that the representation is sufficient to allay concerns about

⁸⁰ See *supra* text accompanying notes 61–68.

⁸¹ *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906 (S.D.N.Y. 1995).

⁸² The ticket of the plaintiff in *Sullivan* was purchased by her traveling companion, who kept it until the time of embarkation. *Id.* at 907.

⁸³ *Id.* at 911.

⁸⁴ In *Morgan Guaranty Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999), upholding a jury trial waiver, the court stated, "although there was clearly a difference in bargaining power between the sides—as there would be between a major bank and virtually any two individuals—the Cranes were not financial neophytes. They had established relationships with a number of Morgan officials over approximately one year, and the fact that the Cranes had previously negotiated changes to agreements with Morgan further demonstrates their ability to negotiate with the bank."

⁸⁵ *E.g.*, *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 708–709 (E.D. La. 1999) (recognizing that there was some inequality of bargaining power, where plaintiffs asserted they had to sign the contracts in order to secure the funding necessary to procure the desired dealership, but holding that this inequality was not sufficient to void the waiver given that plaintiffs "produced no evidence that they could not have gone elsewhere for financing had they found CFC's terms oppressive"); *Phoenix Leasing Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1385 (D. Nev. 1994) (upholding waiver, even though borrower claimed that lender "had a near monopoly with the field of start up loans for fledgling cable companies," and observing that "[t]he ability to take out a loan to start up a profit making cable company is not a necessity of life such that Defendant was compelled to accept Plaintiff's loan on whatever terms it was offered").

the party's lack of bargaining power.⁸⁶ Representation can be important even when the attorney did not actually review the waiver provision.⁸⁷ However, lack of representation is not likely sufficient, absent other factors, to void a waiver.⁸⁸

4. Business or Professional Experience and Sophistication of the Party Opposing the Waiver

Courts are more likely to accept a contractual waiver of a jury trial right when the party opposing the waiver was relatively well educated, or was a sophisticated or experienced lawyer or businessperson.⁸⁹ Courts are

⁸⁶ *In re Reggie Packing*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (relying, in part, on fact that borrower was represented by attorney, to uphold jury trial waiver even though borrower argued that company desperately needed financing and that lender was only available source of credit at time of loan).

⁸⁷ *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (upholding clause in part because franchisee "was represented by counsel, though he chose not to have his lawyer review the Agreement").

⁸⁸ See, e.g., *Orix Credit Alliance, Inc. v. Better Built Corp.*, No. 89 CIV. 7333 (JFK), 1990 WL 96992, at *2 (S.D.N.Y. July 2, 1990) ("Although the presence of counsel at contract negotiations is recommended, the absence of counsel by itself does not destroy the validity of agreements signed or create an unequal bargaining position."); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (upholding waiver, although opponent was not represented by counsel and contract was boilerplate, reasoning that the waiver provision was conspicuous and that agreement was result of years of negotiations between parties).

⁸⁹ E.g., *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (upholding jury trial waiver contained in agreement for lease of oil drilling rig, where parties to agreement were both "sophisticated"); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 830, 833 (4th Cir. 1986) (upholding jury trial waiver contained in equipment lease totaling \$295,000, and emphasizing that lessees were "manifestly shrewd businessmen who had been in a generally successful drilling business for sixteen years," and further emphasizing that although lessees did not read or write, one of their wives had read the proposed lease, crossed out some language, and prepared an additional handwritten document); *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999) (upholding waiver given that borrowers were "experienced business people," in that one was an inventor and founder of a technology company whose stock is publicly traded, and the other is the company's Vice President of Strategic Business, and also Acting Chief Financial Officer, and where both had engaged in sophisticated business transactions such as a buyout of other shareholders, and licensing agreements); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 60 (D.R.I. 1993) (emphasizing, in upholding clause, that the company president who was seeking to avoid the jury trial waiver was an "experienced businessman and attorney," who had "graduated from Yale Law School in 1963 and subsequently served as a law clerk for both the United States Court of Appeals for the District of Columbia and the Supreme Court of the State of Connecticut," and thereafter became a partner at a New York law firm before going on to

particularly willing to uphold waivers as applied to sophisticated parties who were represented by counsel,⁹⁰ even when counsel did not actually review the agreement.⁹¹

On the other hand, courts are more likely to void waivers that are imposed on persons who are lacking in formal education and business experience.⁹² Moreover, numerous courts have also voided waivers imposed on experienced business persons, particularly where the business person was not represented by an attorney,⁹³ or where the showing on some of the other factors was strong.⁹⁴

become president and/or CEO of "several substantial corporations"); *Nat'l Westminster Bank v. Ross*, 130 B.R. 656, 667 (S.D.N.Y. 1991) (upholding jury trial waiver, in part given facts that opponent of waiver had a bachelor's degree in political science, an M.B.A. from Harvard Business School, was the CEO and majority shareholder of a corporation with annual sales of \$9 million, and had six years of experience in negotiating complex financial transactions worth billions of dollars).

⁹⁰ *E.g.*, *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1385 (D. Nev. 1994) (emphasizing, in upholding jury trial waiver, that party protesting waiver not only was sophisticated and experienced professional, but also was represented by counsel at many different stages); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 60 (D.R.I. 1993) (emphasizing fact, in upholding waiver, that company president was represented by counsel, as well as that he was a Yale educated attorney with substantial legal and business experience).

⁹¹ *See, e.g.*, *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 708 (E.D. La. 1999) (upholding jury trial waiver in part because experienced businessperson was represented by counsel, even though attorney did not actually review agreement); *Bonfield v. AAMCO Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (holding same).

⁹² *See, e.g.*, *Sullivan v. AJAX Navigation Corp.*, 881 F. Supp. 906, 911 (S.D.N.Y. 1995) (refusing to enforce waiver contained on back of cruise ticket). *See also* *Rodenbur v. Kaufmann*, 320 F.2d 679, 684 (D.C. Cir. 1963) (narrowly interpreting jury waiver imposed on non-commercial tenant). Despite my serious research attempts, I located almost no cases involving Seventh Amendment jury trial waivers imposed outside the commercial context. My supposition is that companies are hesitant to insert jury trial waivers in such contexts, because they fear they will be deemed unenforceable. Alternatively, it may be that such clauses are included but rarely litigated, at least in published opinions.

⁹³ *E.g.*, *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (rejecting waiver imposed on successful businessman who was not familiar with American legal system, noting also that attorney who represented firm was not shown also to have represented firm's sole shareholder regarding execution of the note); *Heller Fin., Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672, 1990 WL 77500, at *1-2 (N.D. Ill. 1990 May 31, 1990) (rejecting jury trial waiver contained in commercial loan agreement, in part because borrower of over \$400,000 was not represented by counsel).

⁹⁴ *See, e.g.*, *Heller Fin. Inc. v. Finch-Bayless Equip. Co., Inc.*, No. 90 C 1672, 1990 WL 77500 (N.D. Ill. May 31, 1990) (rejecting waiver imposed on corporation in business of leasing and selling heavy equipment, which had signed agreements to borrow more

D. This Author has Located No Cases Upholding Contractual Jury Trial Waivers When Companies Seek to Impose Them Through Unsigned, Uninitialed Clauses

Outside the arbitration context, it appears to be very uncommon for a company to attempt to impose a jury trial waiver in a document which is not signed. That is, it is seemingly quite rare for companies to attempt to impose jury trial waivers using envelope stuffers, employee handbooks, unsigned warranties, or the like. The one such case this author has located, *Sullivan v. Ajax Navigation Corp.*,⁹⁵ involved a jury trial waiver contained in paragraph 8 of the cruise ticket provided to plaintiff. The district court refused to enforce the waiver, holding it was not knowing and intentional.⁹⁶

It is not coincidental that virtually all cases discussing the waiver of jury trial rights, outside the arbitration context, involve situations in which the person or company opposing waiver signed a document expressly calling for waiver of the jury trial right. Clearly it is much easier to show that a waiver was knowing, voluntary, and intelligent where the person who purportedly accepted the waiver actually *signed* a document than where a clause was merely imposed, in small print, in an envelope stuffer or other item that may well have been disregarded. As the court stated in *Cooperative Finance Ass'n v. Garst*,⁹⁷ "[t]he party seeking to enforce a waiver can prepare to meet that burden by careful drafting of the provision, its conspicuous presentation, and preparation of a record that the provision was explained and reviewed, for example, by requiring that the provision be initialed."⁹⁸

than \$400,000); *AAMCO Transmissions, Inc. v. Marino*, Nos. 88-5522, 88-6197, 1990 WL 10024, at *2 (E.D. Pa. Feb. 7, 1990) (rejecting jury trial waiver imposed on franchisees, even though three of the four franchisees admitted that they had read and understood the franchise agreement, on ground that clause was non-negotiable); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Col. 1982) (rejecting jury trial waiver imposed on Peugeot car dealers, without finding that they were ignorant or inexperienced business persons).

⁹⁵ *Sullivan v. Ajax Navigation Corp.*, 88 F. Supp. 906 (S.D.N.Y. 1995).

⁹⁶ *Id.* at 910.

⁹⁷ *Coop. Fin. Ass'n v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995).

⁹⁸ *Id.* at 1172 n.2.

E. Most Courts Addressing the Issue Have Held That the Party Seeking to Establish Contractual Waiver of the Jury Trial Bears the Burden of Proof to Establish That the Waiver Was "Knowing, Voluntary and Intentional"

Many courts have found it unnecessary to resolve the important question of whether it is the proponent or the opponent of a jury trial waiver who bears the burden of proving that the waiver was sufficiently knowing, voluntary, and intelligent. Instead, such courts have often concluded that the waiver is either valid or not valid, regardless of which party bears the burden of proof.⁹⁹

Of those courts that have decided this question, most have held that it is the proponent of the waiver who bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.¹⁰⁰ In contrast, the Sixth Circuit has placed the burden on the opponent of the waiver, contending that principles favoring liberty of contract support enforcement of the waiver.¹⁰¹

⁹⁹ See, e.g., *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 707 (E.D. La. 1999) ("Because the court finds clear contractual waiver in this case, it need not determine whether the burden is on plaintiffs or defendants."); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994) ("Although this circuit has not decided which party bears the burden of proving the validity of an alleged waiver, it is clear in this case that Sevaux did not voluntarily and knowingly waive his right to a jury trial."); *Connecticut Nat'l Bank v. Hollis*, 826 F. Supp. 57, 60 (D.R.I. 1993) (stating court need not decide who bears burden, because in any event waiver is valid).

¹⁰⁰ See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); *Nat'l Equip. Rental Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); *Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in *Leasing Service* [and placed burden of proof on proponent of waiver]."); *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

¹⁰¹ See *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985). The Sixth Circuit cites, as authority, the 1984 second edition of *Moore's Federal Practice*, which it quotes as stating, "In determining whether to give effect to the contractual waiver against an objecting party the court should start with a presumption in favor of validity in the interest of liberty of contract." 757 F.2d at 758 (quoting 5 JAMES WM. MOORE ET AL., *FEDERAL PRACTICE* ¶ 38.46, at 38-400 (2d ed. 1984). However, it is

F. Several Courts Have Held That Jury Trial Waivers Must Be Narrowly Construed to Ensure Protection of the Seventh Amendment Right to a Jury Trial

The Seventh Amendment jury trial right may affect the interpretation or construction of a waiver, as well as the initial determination of whether any waiver was made. Relying on this clause, several courts have interpreted jury trial waivers narrowly and, thus, have not applied them to some of the claims at issue. In narrowly interpreting a waiver provision, the district court in *Luis Acosta, Inc. v. Citibank*¹⁰² stated, "[c]aution is . . . advisable in interpreting the scope of a clause that would putatively waive a fundamental right."¹⁰³ The district court in *National Acceptance Co. v. MYCA Products Inc.*¹⁰⁴ similarly stated that because the Seventh Amendment jury trial right is fundamental, "[c]ourts will narrowly construe any waiver of this right"¹⁰⁵ In addition, the D.C. Circuit, in *Rodenbur v. Kaufmann*,¹⁰⁶ found that although a tenant's lease did contain a jury trial waiver, the clause did not apply to the negligence claim plaintiff brought when she slipped and fell on the property. It explained that,

The clause, strictly construed as it must be, did not bar a jury trial as to rights which the tenant might have against the landlords unless issues with respect thereto arose out of or were in some way connected with the lease of her apartment. Such is the plain meaning of the language.¹⁰⁷

interesting that the current version of Moore's Federal Practice states only that "the case law is not clear as to who bears the burden of proving waiver." 8 JAMES WM. MOORE ET AL., FEDERAL PRACTICE ¶ 38.52[1][d] (3d ed. 2000).

¹⁰² *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 17 (D.P.R. 1996).

¹⁰³ *Id.* (holding that jury trial waiver contained in "factor lien agreement" entered into between commercial borrower and bank applied only to disputes arising under that agreement, even though bank argued that the waiver "was effectively extended to all of the other contracts, or at the very least, to the Loan Agreement, by a series of provisions that tied together all of the contracts").

¹⁰⁴ *Nat'l Acceptance Co. v. MYCA Prods., Inc.*, 381 F. Supp. 269, 270 (W.D. Pa. 1974).

¹⁰⁵ *Id.* (holding that jury trial waiver contained in Loan and Security Agreement relates only to an action arising directly out of that agreement, and not to other disputes between the parties).

¹⁰⁶ *Rodenbur v. Kaufmann*, 320 F.2d 679, 684 (D.C. Cir. 1963).

¹⁰⁷ *Id.* See also *Okura & Co. v. Careau Group*, 783 F. Supp. 482, 491 (C.D. Cal. 1991) (holding that jury trial waivers contained in financing agreement, promissory

In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."¹⁰⁸

G. *Summary on Interpretation of Contractual Jury Trial Waivers*

In interpreting contractual jury trial waivers, courts employ a fairly standard analysis. Most courts explain that because the jury trial right is "fundamental," they will indulge every presumption against waiver. The courts then enforce the waivers only when they are found to be knowing, voluntary, and intentional. To make this determination, they look at a series of overlapping factors relating to the negotiability of the waiver: whether it was actually negotiated, whether counsel assisted with the negotiation, whether the waiver was clear and conspicuous, whether there was a significant disparity of bargaining power, and whether the party opposing the waiver is relatively knowledgeable and sophisticated.

Most of the Seventh Amendment contractual jury trial waiver cases discussed above involve commercial transactions, most frequently loans, leasing agreements, and franchise or distribution contracts. Given that these transactions almost always involved large sums of money and relatively sophisticated parties, it is not surprising that courts frequently upheld the waivers, concluding for example that the language was sufficiently clear, that the parties at least had the power not to participate in the transaction, and that any disparity of bargaining power was not so severe as to void the agreement.

It is quite striking, however, that even in these relatively sophisticated commercial contexts, some courts refused to enforce contractual jury trial waivers. For example, in *Luis Acosta, Inc. v. Citibank*,¹⁰⁹ the district court refused to enforce a jury trial waiver included in a commercial loan agreement, even though it recognized that the borrower was a shrewd and experienced businessman, because the lender failed to provide evidence of "the parties' specific negotiations over the waiver, the conspicuousness of the provision, nor the parties' relative bargaining power."¹¹⁰ In another

notes, and individual defendants' personal guaranties applied to most but not all of the disputes between the parties).

¹⁰⁸ *Nat'l Acceptance Co.*, 381 F. Supp. at 271 (holding that jury trial waiver contained in Loan and Security Agreement did not apply to claim for damages based on alleged breach of oral agreement entered into more than two years after initial agreement).

¹⁰⁹ *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15 (D.P.R. 1996).

¹¹⁰ *Id.* at 19.

commercial loan case, *K.M.C. Co. v. Irving Trust Co.*,¹¹¹ a case involving a line of credit for more than \$3 million,¹¹² the court refused to enforce a contractual jury trial waiver because the borrower submitted evidence showing the lender had lulled the borrower into signing by assuring the borrower that the waiver would not be enforced, absent fraud.¹¹³ Courts have voided jury trial waivers in the franchise and distribution contexts as well. In *AAMCO Transmissions, Inc. v. Marino*,¹¹⁴ a case involving a dispute between franchiser and franchisee, the court rejected the jury trial waiver on the ground that it was imposed on a take-it-or-leave-it basis, even though the record showed franchisees had prior knowledge of the clause and did not show they had objected to it.¹¹⁵ As well, in *Dreiling v. Peugeot Motors of America, Inc.*,¹¹⁶ the court refused to enforce a jury trial waiver contained in the dealer agreement explaining that the franchiser failed to prove the term was explicitly bargained for or brought to franchisee's attention.¹¹⁷ In the leasing context, the Second Circuit voided the jury trial waiver clause in *National Equipment Rental, Ltd. v. Hendrix*,¹¹⁸ a case involving leases of equipment requiring monthly payments of over \$3,000.¹¹⁹ It concluded the waiver was too inconspicuous and that the lessee had no choice but to accept the provision.¹²⁰ And, in *Hydramar, Inc. v. General Dynamics Corp.*,¹²¹ the court found a jury trial waiver contained in a

¹¹¹ *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985).

¹¹² *Id.* at 758.

¹¹³ *Id.* at 758. See also *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (voiding jury trial waiver, in transaction involving loan for \$1 million, reasoning that while borrower was sophisticated businessman he was not familiar with the U.S. legal system, and noting that the clause was never discussed, relatively inconspicuous, and that the borrower badly needed the loan); *Heller Fin. Inc. v. Finch-Bayless Equip. Co.*, No. 90 C 1672, 1990 WL 77500 (N.D. Ill. May 31, 1990) (refusing to uphold waiver contained in transaction involving loans totaling over \$400,000, because clause was relatively inconspicuous, borrower claimed not to have read the waiver, it was contained in form agreement, and borrower was not represented). Cf. *Nat'l Acceptance Co.*, 381 F. Supp. at 270 (W.D. Pa. 1974) (interpreting jury trial waiver contained in commercial loan agreement narrowly, not to cover dispute at hand).

¹¹⁴ *AAMCO Transmissions, Inc. v. Marino*, Nos. 88-5522, 88-6197, 1990 WL 10024 (E.D. Pa. Feb. 7, 1990).

¹¹⁵ *AAMCO Transmissions*, 1990 WL 10024, at *2.

¹¹⁶ *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402 (D. Col. 1982).

¹¹⁷ *Id.* at 403.

¹¹⁸ *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977).

¹¹⁹ *Id.* at 257.

¹²⁰ *Id.* at 258.

¹²¹ *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. Civ. A. 85-1788, 1989 WL 159267 (E.D. Pa. Dec. 29, 1989).

commercial ship construction contract too inconspicuous to be enforceable.¹²²

This Author located just two Seventh Amendment cases involving non-commercial situations, a fact which may reflect companies' recognition that such jury trial waivers are not likely to be upheld. In both cases, the jury trial waiver was not enforced. First, in *Sullivan v. AJAX Navigation Corp.*,¹²³ the case most similar to those cases in which companies use form contracts of adhesion to impose binding arbitration on consumers or employees, the Southern District of New York found that a jury trial waiver contained on the back of a cruise ship ticket was not enforceable.¹²⁴ In *Rodenbur v. Kaufmann*,¹²⁵ a case involving a tenant in an apartment on the fourth floor of a fifty eight-unit apartment building, the court did not rule on the overall validity of the jury trial waiver contained in the lease but concluded the waiver must in any event be interpreted narrowly, so that it did not cover plaintiff's personal injury claim.¹²⁶

III. COURTS FAIL TO EMPLOY TRADITIONAL JURY TRIAL ANALYSIS WHEN DECIDING ARBITRATION CASES

Although it is evident that an agreement to arbitrate includes a waiver of jury trial rights, courts do not employ the analysis outlined above in interpreting arbitration clauses. Yet, with very few exceptions, courts do not address this dichotomy, but rather simply determine the enforceability of arbitration clauses using an entirely different set of principles than they use when determining the enforceability of jury trial waivers. Specifically, courts treat arbitration clauses as ordinary contractual provisions, requiring no special protections, rather than as jury trial waivers.¹²⁷ Indeed, some courts have interpreted federal arbitration policy to require them to adopt

¹²² *Id.* at *4.

¹²³ *Sullivan v. AJAX Navigation Corp.*, 881 F. Supp. 906 (S.D.N.Y. 1995).

¹²⁴ The court simply found that in merely pointing to the language, font size and placement of the waiver on the ticket, defendant had failed to meet its burden of showing that the traveler was aware she was relinquishing a constitutional right at the time she boarded the cruise ship. *Id.* at 911. While the court did mention that plaintiff's ticket was purchased by her companion, who kept it until they boarded the ship, *id.* at 907, the court at no time suggests this fact was critical to its analysis.

¹²⁵ *Rodenbur v. Kaufmann*, 320 F.2d 679, 684 (D.C. Cir. 1963).

¹²⁶ *Id.* at 364-65. In *Gaylord Department Stores of Alabama v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981), a state court decision, the court applied a similar standard and concluded that a jury trial waiver contained in the agreement between a pharmacist and a department store was not valid because it was buried in paragraph thirty-four of the agreement and also due to the disparity in bargaining power.

¹²⁷ See *infra* text accompanying notes 140-81.

special presumptions favoring arbitration, thereby justifying an even more lenient waiver standard than would be appropriate in a typical contractual context.¹²⁸ The sub-sections which follow discuss the approach most courts take in interpreting arbitration clauses.¹²⁹ They will draw on some state as well as federal decisions, even though the Seventh Amendment is only applicable in federal court, because the federal and state courts have approached arbitration clauses similarly.¹³⁰

A. Many Courts State That Because Arbitration Is "Favored" or "Preferred," They Will Indulge Presumptions In Favor of Arbitration

The U.S. Supreme Court has led the way in stating that arbitration is "favored," and has cited the Federal Arbitration Act as supporting this position. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹³¹ in 1983, the Court stated,

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.¹³²

¹²⁸ See *infra* text accompanying notes 131–39, 182–87.

¹²⁹ It should be noted, however, that a few courts derive a stricter standard of consent from certain federal statutes, and therefore enforce arbitration agreements covering such claims only when the arbitration was agreed to knowingly, or knowingly and voluntarily. See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (rejecting agreement to arbitrate Title VII claim on ground it was not "knowing"); *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998) (refusing to enforce agreement to arbitrate ADA claim because it was not "knowing"); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 955 (N.D. Ind. 2000) (refusing to enforce agreement to arbitrate ADA claim because agreement was not found to be "knowing and voluntary").

¹³⁰ Actually, although one might have expected that the federal courts would apply the Seventh Amendment to require a tougher waiver standard than is applied in state courts, it seems that federal courts are actually more willing to enforce arbitration clauses than are state courts. See Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 93–94 (1998).

¹³¹ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

¹³² *Id.* at 24–25. Significantly, and as I have discussed elsewhere, the Court did not provide any clear rationale for *why* arbitration should be favored over litigation. See Jean

Because it finds arbitration "favored," the Court has interpreted defenses to arbitration narrowly,¹³³ interpreted arbitration clauses broadly,¹³⁴ and mandated arbitration in a broad array of areas.¹³⁵ Lower federal courts have similarly emphasized the "favored" status of arbitration in determining that an agreement to arbitrate exists,¹³⁶ interpreting arbitration clauses broadly,¹³⁷

R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-61 (1996).

¹³³ *Moses H. Cone*, 460 U.S. at 24-25 (stating that such defenses to arbitration as laches, estoppel and waiver should be interpreted narrowly).

¹³⁴ *See, e.g., Mastrobucchi v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (citing policy favoring arbitration to support decision allowing arbitrators to award punitive damages).

¹³⁵ *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing "favoritism" policy in holding that claims under the Age Discrimination in Employment Act can be arbitrated); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (mentioning "favoritism" policy in holding that securities fraud claims are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating that although "the parties' intentions control . . . those intentions are generously construed as to issues of arbitrability").

¹³⁶ *See, e.g., McClendon v. Sherwin Williams, Inc.*, 70 F. Supp. 2d 940, 942 (E.D. Ark. 1999) (taking note of "broad federal policy favoring arbitration" in concluding that handbook language was sufficient to constitute offer of arbitration, and that plaintiff agreed to submit future disputes to binding arbitration by remaining an employee); *Cooper v. Citigroup, Inc.*, No. Civ. A 3:99-CV-1471-G, 1999 WL 1007664, at *1-2 (N.D. Tex. Nov. 5, 1999) (mem.) (noting that "[b]oth federal and applicable state law strongly favor arbitration," in concluding that employee agreed to binding arbitration where employee handbook called for binding arbitration, and where employee had signed a statement acknowledging that she had received the handbook and would comply with all company procedures and policies).

¹³⁷ *See, e.g., Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995) ("Notwithstanding the ambiguity [over whether the clause applies to the dispute at hand] . . . (or perhaps more correctly, because of such ambiguity), we conclude that the most appropriate construction . . . is to apply [the] arbitration provisions to employment disputes involving these Plaintiffs."); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (holding request for arbitration may not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996) (holding, in light of preference for arbitration, that clause covers disputes even though it "could have been drafted with more precision"); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (interpreting arbitration clause broadly, as covering tort, fraud and deceit claims as well as breach of contract claims); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53-54 (7th Cir. 1995) (citing federal policy favoring arbitration in interpreting clause broadly to cover statutory as well as contractual claims); *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 245-51 (2d Cir. 1991) (explaining that federal policy favoring arbitration means that clauses should be interpreted as broadly as possible).

interpreting defenses to arbitration narrowly,¹³⁸ and holding that a vast array of disputes are subject to mandatory arbitration.¹³⁹

B. Many Courts Have Upheld Arbitration Clauses That Were Not Accepted "Knowingly, Voluntarily And Intentionally"

Courts do not generally require that contracts be entered into knowingly, voluntarily, or intelligently. Thus, instead of using such subjective measures for contractual validity as comprehending or even actual assent, they typically use an objective test. As commentator Stephen Ware puts it,

The requirement to form a contract is not that parties actually assent to its terms. The requirement is that they take actions—such as signing their names on a document or saying certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract. In other words, contract formation technically requires, not mutual assent, but mutual manifestations of assent. Contract law does this to satisfy "the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individual's behavior that apparently manifests their assent to a transfer of entitlements."¹⁴⁰

Professor Ware then defends the application of these general contract principles to arbitration, pleading "to keep anti-contract approaches out of arbitration law and, more broadly, to make contract the central principle throughout consumer law."¹⁴¹

¹³⁸ See, e.g., *Ex parte Smith*, 736 So. 2d 604, 610 (Ala. 1999) ("Because of the strong federal policy favoring arbitration, courts will not lightly infer a waiver of arbitration rights.").

¹³⁹ See, e.g., *Williams v. Imhoff*, 203 F.3d 758, 763, 767 (10th Cir. 2000) (noting federal policy favoring arbitration and concluding that ERISA claims are arbitrable); *Jones v. Fujitsu Network Communications Inc.*, 81 F. Supp. 2d 688, 690, 695 (N.D. Tex. 1999) (noting federal policy favoring arbitration and concluding claims under Family and Medical Leave Act are arbitrable).

¹⁴⁰ Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113–14 (1996) (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 301 (1986)).

¹⁴¹ Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 196 (1998). "Anti-contract" is the phrase Professor Ware uses to describe measures designed to protect consumers and others. The phrase includes mandatory disclosure provisions, requirements that certain contracts be entered on a "knowing and voluntary" basis, as well as rules that preclude the alienability of certain rights. *Id.* at 196, 206–17.

Most courts have applied this general approach to contracts to arbitration clauses. With very rare exception, courts do not currently require that arbitration clauses be entered into knowingly, voluntarily, or intelligently.¹⁴² In typical cases, courts do not even consider the fact that someone might think such a strict requirement was applicable. Rather, such cases simply apply standard "objective" rules for contract formation, holding that adhesive contracts are valid, so long as they are not unconscionable, fraudulent, obtained under duress, or otherwise invalid.¹⁴³ As discussed below, such courts then go on to compel arbitration in many circumstances that at least raise a question as to the knowingness, voluntariness, and intelligence of the waiver.¹⁴⁴

C. Courts Interpreting Arbitration Clauses Frequently State That the Non-Negotiability of the Waiver, the Fact That It Was Not Actually Negotiated, Its Non-Conspicuousness, Disparity in Bargaining Power Between the Parties, and the Lack of Business or Professional Experience of the Party Opposing the Arbitration, Are Not Sufficient to Void an Arbitration Clause

1. Non-Negotiability of the Arbitration Clause

Courts have repeatedly stated that the mere fact that arbitration is imposed through a contract of adhesion is not enough to void the clause. They have, for example, upheld clauses imposed without negotiation on mobile home purchasers,¹⁴⁵ investors,¹⁴⁶ employees,¹⁴⁷ consumers

¹⁴² See generally *id.* at 197 (stating "the contractual approach to arbitration law . . . has become the law of the land"). A few courts have applied a stricter standard for claims brought under particular statutes. See *id.* at 196.

¹⁴³ See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286-88 (9th Cir. 1988) (setting out objective theory of contract and holding securities customer was bound by agreement to arbitrate, although broker made no effort to explain its meaning); *Flynn v. Aerchem, Inc.*, 102 F. Supp. 2d 1055, 1060, 1063 (S.D. Ind. 2000) (upholding arbitration clause against claims of lack of voluntary and intelligent waiver and stating "[f]ailing to understand what one agrees to in a contract is not a viable excuse for non-performance").

¹⁴⁴ See *infra* Part III.C.

¹⁴⁵ See, e.g., *Fleetwood Enter., Inc. v. Bruno*, No. 1990912, 2000 WL 1716975 (Ala. Nov. 17, 2000) (enforcing arbitration clause signed by purchaser as part of transaction); *Ex parte Smith* 736 So. 2d 604, 612 (Ala. 1999) (upholding an arbitration clause that was imposed on a purchaser of a mobile home through the financing documents used in connection with the sale, and observing that the mere facts that the agreement was not negotiable, and that because purchaser was in a hurry to get elsewhere he did not read the contract, did not mean the agreement should be voided as unconscionable). But see

contracting for termite extermination services,¹⁴⁸ automobile purchasers,¹⁴⁹ investors,¹⁵⁰ and non-commercial borrowers.¹⁵¹

2. *Conspicuousness of the Arbitration Clause*

Arbitration clauses need not be particularly clear or conspicuous to be enforced. Rather, courts have demonstrated a willingness to uphold arbitration clauses written in small type, buried in the midst of long

Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958 (W.D. Vir. 2000) (invalidating arbitration clause imposed on mobile home purchaser on ground that it was precluded by Magnuson Moss Act).

¹⁴⁶ See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (upholding arbitration clause imposed on securities investors though it was a contract of adhesion).

¹⁴⁷ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (stating "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context"); *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal. Rptr. 2d 533, 540-41 (Cal. Ct. App. 1998) (even assuming that employee could show that arbitration clause was presented to her as part of a standardized contract, imposed by a party of superior strength, such showing would not invalidate arbitration clause unless it could also be shown to be substantively unconscionable).

¹⁴⁸ See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding FAA preempted Alabama statute that would have voided form mandatory arbitration clause used by pest exterminator); *Morris v. Terminix Services, Inc.*, No. 1990485, 2000 WL 1603657, at *1-3 (Ala. Oct. 27, 2000) (holding that adhesive arbitration agreement between termite extermination company and home owners covered events which transpired prior to when it was entered into).

¹⁴⁹ See, e.g., *Capitol Chevrolet & Imports, Inc. v. Grantham*, No. 1990404, 2000 WL 1716976 (Ala. Nov. 17, 2000) (upholding form arbitration clause imposed on purchaser of new automobile).

¹⁵⁰ See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (upholding arbitration clause imposed on securities investors though it was a contract of adhesion).

¹⁵¹ See, e.g., *Wirdzek v. Monetary Mgmt. of Calif., Inc.*, No. CV-F-99-5415-REC-LJO, 1999 WL 688100, at *2 (E.D. Cal. May 25, 1999) (stating that person who entered series of "payday loan" contracts would be required to arbitrate dispute, where last contract included arbitration clause, "[e]ven if Plaintiff did not have a meaningful choice about whether to accept the arbitration provision . . ."); *Smith v. Equifirst Corp.*, 117 F. Supp. 2d 557, 564 (S.D. Miss. 2000) (upholding arbitration clause imposed on mortgagors that was allegedly "hidden in large stack of documents"); *Commercial Credit Corp. v. Leggett*, 744 So. 2d 890, 891-93 (Ala. 1999) (upholding arbitration clause contained in documents issued to low income single mother, in connection with loan for \$1,900, although borrower stated that no one explained to her what arbitration was or that she would be waiving her jury trial right, that she never understood the agreement, and that she would not have agreed to it had she understood).

documents, and not identified by special bold or capital letters.¹⁵² They have also enforced arbitration agreements when the document signed did not refer to arbitration, but merely incorporated by reference another document that called for arbitration.¹⁵³ Courts have even permitted arbitration to be imposed retroactively, where a person agreed to be bound by certain rules that were ultimately amended to call for arbitration,¹⁵⁴ or where only the most recent in

¹⁵² See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 176–77, 182–84 (3d Cir. 1999) (upholding enforceability of arbitration clause contained in small print, on the back and near the bottom of a form contract employed as part of a secondary mortgage contract allegedly used as part of a scheme to defraud elderly, unsophisticated low and middle income home owners); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (upholding validity of arbitration clause contained in small print in warranty booklet shipped to customer with computer, together with many other peripherals and explanatory booklets); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834–35 (8th Cir. 1997) (enforcing arbitration agreement that appeared on page thirty-one of employee handbook); *Blount v. Nat'l Lending Corp.*, 108 F. Supp. 2d 666, 669–70 (S.D. Miss. 2000) (upholding arbitration clause imposed on residential mortgagors, though plaintiffs contended they "lacked knowledge of it, . . . did not voluntarily enter into it, it was inconspicuous because it was 'hidden in a large stack of documents unfamiliar to Plaintiffs,' . . . they had no opportunity to study the agreement, [and] they were presented with the agreement on a 'take it or leave it basis,'" where court emphasized agreement was contained in a separate document and signed by each plaintiff); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 WL 307747, at *3–5 (N.D. Cal. Aug. 4, 1993) (concluding that consumers who obtained home loans were bound by arbitration clause contained in financing documents, even assuming that the form was "buried" among many documents, though none of the plaintiffs could recall reading or hearing about the agreement, and although none were even aware of arbitration as a method of dispute resolution, prior to this litigation). Cf. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that Montana statute requiring that certain type of notice be afforded as to existence of arbitration provision was preempted by FAA).

¹⁵³ See, e.g., *R.J. O'Brien & Assoc. Inc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995) ("[T]he NFA and CFTC forms do not specifically mention arbitration. A contract, however, need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document."). *Bakula v. Schumacher Homes, Inc.*, No. 2000-6-2272, 2001 WL 179827 (Ohio Ct. App. Feb. 26, 2001) (finding homeowners required to arbitrate where purchase contract mentioned warranty, and where New Home Owner Manual subsequently sent to homeowners included arbitration clause as well as limited warranty).

¹⁵⁴ See, e.g., *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (holding that employee who had agreed to be bound by NASD rules "as may be amended from time to time" could be required to take employment discrimination claim to arbitration, even though NASD rules did not call for such arbitration at the time employee agreed to be bound by them). But see *Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405, 413–15 (N.J. Super. Ct. App. Div. 2000) (holding employee who signed arbitration agreement did not knowingly and voluntarily waive right to jury trial on statutory claim because, at time of signature, statute did not provide for jury trial).

a series of contracts calls for arbitration.¹⁵⁵ In addition, one court found an employee was bound by the terms of the employer's arbitration program where the employee admitted receiving only a letter generally mentioning the program and received nothing describing it in detail or providing its terms.¹⁵⁶

Nor have courts required that clauses explain the nature of binding arbitration, nor even that they explain arbitration means that parties are giving up their right to go to court and present their claims to a jury.¹⁵⁷ Although this law professor has found that law students and even lawyers may not realize that an agreement to binding arbitration waives all rights to present claims in court, courts have often held that lay persons can be assumed to have that knowledge.¹⁵⁸

¹⁵⁵ See, e.g., *Morris v. Terminix Services, Inc.*, No. 1990485, 2000 WL 1603657, at *1-3 (Ala. Oct. 27, 2000) (interpreting federal policy favoring arbitration to "mandate that a court give the broadest possible interpretation to an arbitration agreement and resolve all doubts in favor of arbitration," and therefore holding that arbitration agreement covered events which transpired prior to when it was entered into); *Wirdzek*, 1999 WL 688100, at *1-2 (holding that plaintiff who entered into a series of eight "payday loan" contracts would be required to arbitrate disputes arising out of prior events, and noting that plaintiff's attorney did not contest this point).

¹⁵⁶ *Cole v. Halliburton Co.*, No. CIV-00-0862-T, 2000 WL 1531614 at *1-2 (W.D. Okla. Sept. 6, 2000). The company also argued that it was appropriate to assume the employee received the more complete mailings, because the company had evidence showing they were mailed and not returned, and the employee had no sufficient evidence to rebut that evidence. *Id.* at *2-3.

¹⁵⁷ See, e.g., *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994) (holding plaintiffs, senior citizens who had entered into "reverse mortgage loans" providing them with cash in exchange for equity in their home, were bound by arbitration clause contained in deeds of trust). The court explained:

Contrary to [the] plaintiffs' assertions, it does not take a 'clairvoyant' to understand the meaning of [the] clause. Regrettably, [the] plaintiffs' assumption of loans without understanding all of the terms of the contract may represent the norm and not the exception. This failure to inquire however, will not shield them from obligations clearly and explicitly contained in the agreement.

Id. at *5. See also *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) (finding no fraud in broker's failure to verbally disclose arbitration provision to customers because "law presumes that one has read that which he has signed"); *Rosen v. Waldman*, No. 93-Civ. 225 (PKL), 1993 WL 403974, at *3 (S.D.N.Y. Oct. 7, 1993) (requiring broker to explain or disclose arbitration clause to client "would undermine the strong federal policy favoring arbitration").

¹⁵⁸ In *Cohen v. Wedbush, Noble, Cooke Inc.*, 841 F.2d 282 (9th Cir. 1988) the court held that plaintiffs, securities brokerage customers, would be bound by the arbitration clause they had signed as part of the brokerage agreement, even though they claimed the brokerage had misled them by failing to explicitly inform them of the clause or explain its meaning. The court stated,

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In fact, far from requiring conspicuousness and clarity, a number of courts have even upheld the imposition of arbitration where companies were said to have verbally misled consumers or others regarding the provision. For example, some courts have rejected fraud claims even though the company's agent allegedly falsely stated that signing the clause would not compromise any rights.¹⁵⁹ Other courts have enforced arbitration clauses even though company representatives lulled consumers into signing the clauses by stating they were mere formalities.¹⁶⁰

We know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly provides for arbitration

. . . .

We see no unfairness in expecting parties to read contracts before they sign them.

. . . .

We are unable to understand how any person possessing a basic education and fluent in the English language could fail to grasp the meaning of that provision. *Id.* at 287–88 (citation omitted). *See also* Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 339 (7th Cir. 1984) ("[T]hough perhaps not contemplated by the [plaintiffs] when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate. The [plaintiffs] cannot use their failure to inquire about the ramifications of that clause to avoid the consequences of agreed-to arbitration."); Bakri v. Continental Airlines, Inc., No. CV 92–3476 SVW(k), 1992 WL 464125, at *2 (C.D. Cal. Sept. 24, 1992) (upholding arbitration clause although employee claimed not to understand the meaning of "final and binding" in that "[t]hese words are both plain on their face and typical of arbitration clauses").

¹⁵⁹ *See, e.g., Cohen*, 841 F.2d at 287 (stating that customer's reliance on false statement was not reasonable, and thus not actionable, where customer could have ascertained truth by carefully reading contract); Snap-on Tools Corp. v. Vetter, 838 F. Supp. 468, 472 (D. Mont. 1993) (holding that franchisee could not complain of false verbal statement given language in contract).

¹⁶⁰ *See, e.g., Smith Barney Shearson, Inc. v. DeFries*, No. 94-Civ. 0020 (WK), 1994 WL 455178, at *2 (S.D.N.Y. Aug. 19, 1994) (enforcing arbitration clause although broker allegedly told customer it was a "mere formality"); *Benoay v. E.F. Hutton & Co.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988) (upholding clause, where agent informed customer that clause was a mere formality, reasoning that "[a] party who signs an instrument is presumed to know its contents"). *See also Houlihan v. Offerman & Co.*, 31 F.3d 692, 694 (8th Cir. 1994) (upholding clause signed by securities customer even though company sent it with letter implying it was similar to agreement the customer had already signed and should be signed again as mere updating formality required by federal agencies); *Oakwood Mobile Homes, Inc. v. Barger*, 773 So. 2d 454, 459–61 (Ala. 2000) (upholding arbitration imposed on mobile home purchaser, although salesman purportedly represented documents containing arbitration clause as being "for insurance purposes"). *But see Thermo-sav, Inc. v. Bozeman*, No. 1991106, 2000 WL 1603654

3. Relative Bargaining Power of the Parties

Courts have frequently upheld arbitration clauses despite vast differences in the bargaining power of the parties. Notwithstanding claims of disparate power, they have frequently allowed companies to impose arbitration on their employees,¹⁶¹ lenders to impose arbitration on borrowers,¹⁶² large companies to impose arbitration on purchasers of their products,¹⁶³ or services,¹⁶⁴ and franchisors to impose arbitration on franchisees.¹⁶⁵

(Ala. Oct. 27, 2000) (refusing to enforce arbitration clause contained on reverse side of contract, where contractor failed to inform customer that back side contained additional terms, where signature was on front, and where contract was attached to a clipboard, with only the front showing).

¹⁶¹ In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court stated "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," while recognizing that agreements could be voided where there was a showing of "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Id.* at 33. It found no substantial inequality of bargaining power where the plaintiff, *Gilmer*, was "an experienced businessman." *Id.* See also *Flynn v. Aerchem, Inc.*, 102 F. Supp. 2d 1055, 1061–62 (S.D. Ind. 2000) (upholding arbitration clause although plaintiff stated that if she signed the clause, she did so under economic duress, in that her finances were unstable as she was in the midst of a divorce, and observing that disparity in bargaining power was not great enough to void clause because employee possessed the power to quit her job); *McNaughton v. United Healthcare Services, Inc.*, 728 So. 2d 592, 596–98 (Ala. 1998) (stating arbitration clause imposed on employee by employer is not void either because it was a contract of adhesion or because there was an inequality of bargaining power).

¹⁶² *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 176, 182–83 (3d Cir. 1999) (rejecting claim of unconscionability made by couple allegedly targeted in scheme to take advantage of "relatively unsophisticated, low-to middle-income, senior citizens," and concluding that combination of imbalance of power and inconspicuousness of clause were not sufficient to show procedural unconscionability); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 657–58 (S.D. Miss. 2000) (rejecting mobile home purchaser's argument that arbitration clause contained in financing documents was procedurally unconscionable because borrower is "an unsophisticated consumer purchaser," lender is "a sophisticated corporate lender," terms were complex, and contract was adhesive and buried in body of contract in fine print, and reasoning that clause was last paragraph of contract, located above space where plaintiff signed).

¹⁶³ See, e.g., *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147, 1050–51 (7th Cir. 1997) (holding customer bound by arbitration clause contained in limited warranty booklet shipped with computer).

¹⁶⁴ See, e.g., *Sankey v. Sears, Roebuck and Co.*, 100 F. Supp. 2d 1290, 1298–99 (M.D. Ala. 2000) (upholding arbitration clause imposed on customer by pest extermination provider, even though customer "undoubtedly had weaker bargaining power and probably had little choice in the inclusion of the arbitration clause in the

4. Business or Professional Experience and Sophistication of the Party Opposing Arbitration

Courts have repeatedly stated that they will not void mandatory arbitration clauses merely because they are applied to persons who are elderly, read poorly, or are otherwise unsophisticated.¹⁶⁶ For example, in *Ex parte Napier*,¹⁶⁷ the Alabama Supreme Court upheld an arbitration clause that was included as paragraph twenty-one in the financing documents connected to the purchasers of a \$37,028 mobile home.¹⁶⁸ One of the purchasers "testified that she was 77 years old, did not finish high school, had poor eyesight, had difficulty reading, and could not read small print."¹⁶⁹ The other purchaser, her brother, "was 72 years old, did not finish high school, and had difficulty reading."¹⁷⁰ Nonetheless, the court found the siblings had failed to present sufficient evidence to void the clause on grounds of unconscionability.¹⁷¹ Other courts have issued similar decisions.¹⁷²

Agreement"); *Parsley v. Terminix Int'l Co.*, No. C-3-97-394, 1998 WL 1572764, at *5 (S.D. Ohio Sept. 15, 1998) (enforcing arbitration clause contained in pest extermination contract, although the company drafted the contract and had greater bargaining power, and also accepting that plaintiff was an older woman who lacked experience in such transactions).

¹⁶⁵ See, e.g., *KKW Enter., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49–52 (1st Cir. 1999) (holding that state law prohibiting use of forum selection clause in franchise agreement was preempted, when included with arbitration clause).

¹⁶⁶ But see *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 954–55 (N.D. Ind. 2000) (concluding that agreement to arbitrate must be "knowing and voluntary" to comply with ADA, and further stating that "[t]his court is hard-pressed to believe that the average job applicant at Ryan's competing for a job washing dishes or waiting tables could possibly pick-up on the intricacies of the Agreement and understand the contractual scenario involved, and then boldly pose questions to the manager conducting his or her interview or consult an attorney before signing").

¹⁶⁷ *Ex parte Napier*, 723 So. 2d 49, 50 (Ala. 1998).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 52.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 52–53. As will be discussed elsewhere, *infra* at note 184, this opinion also placed the burden of proving invalidity on the parties opposing the clause, and held that relying on the Alabama state constitution to shift this burden of proof would violate the preemption principles of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

¹⁷² See, e.g., *Mitchell Nissan, Inc. v. Foster*, No. 1982183, 2000 WL 804452 *3 (Ala. June 23, 2000) (concluding man who only read at sixth grade level was bound by arbitration clause contained in document connected to purchase of new car); Results

D. Numerous Courts Have Upheld Arbitration Clauses Imposed Through Unsigned, Uninitialed Clauses

Many companies have begun to impose arbitration through clauses that are neither signed nor initialed, and courts do not generally find such contracts impermissible, unless they are problematic for other reasons.¹⁷³ Significantly, the Federal Arbitration Act does not require that arbitration clauses be signed or initialed, but only that they be written.¹⁷⁴

For example, in *Hill v. Gateway 2000, Inc.*,¹⁷⁵ the Seventh Circuit upheld an arbitration clause that was contained in a warranty booklet sent to the customer with his computer. Although neither a signature nor initials were asked for or obtained, the court found the clause enforceable on the ground that the consumer could have read it and avoided it by sending back the computer within thirty days.¹⁷⁶

Oriented, Inc. v. Crawford, 538 S.E.2d 73, 75-79 (Ga. Ct. App. 2000) (upholding mandatory arbitration clause imposed on mobile home purchaser, although purchaser stated he was not a sophisticated businessman, that paperwork was approximately 1 inch thick, and that salesman stated "its [sic] just standard documents," where court emphasized purchaser had simply failed to read documents, and that plaintiff did not show he was prevented from reading the documents); Parsley v. Terminix Int'l Co., No. C-3-97-394, 1998 WL 1572764, at *5 (S.D. Ohio Sept. 15, 1998) (enforcing arbitration clause contained in contract of adhesion imposed on purchaser of termite extermination services, even assuming plaintiff was "a sixty-three year old woman with little education and little or no experience in similar transactions").

¹⁷³ There are some significant recent exceptions. See e.g., Long v. Fidelity Water Systems, Inc., No. C-97-20118 R.M.W., 2000 WL 989914, at *3 (N.D. Cal. May 26, 2000) (refusing to enforce arbitration clause contained in modification to credit card agreement); Walker v. Air Liquide Am. Corp., 113 F. Supp. 2d 983, 985-86 (M.D. La. 2000) (refusing to enforce arbitration clause contained in employee handbook, even though employee signed acknowledgment of receipt, and reasoning that acknowledgment was not sufficient to constitute written acceptance of arbitration provision); Union Planters Bank, N.A. v. Watson, No. CV-98-2453, 2000 WL 1841875, at *3 (Ala. Dec. 15, 2000) (refusing to enforce arbitration clause contained in subsequent mailing done by bank, where customers had not signed new signature cards); S. Energy Homes, Inc. v. Hennis, No. 1982118, 2000 WL 1074048, at *2, 3 (Ala. Aug. 4, 2000) (refusing to enforce arbitration clause allegedly contained in mobile home owner's manual on ground that seller had not adequately proven clause was in manual, and observing in dicta that mere inclusion in manual is insufficient to show buyer's consent to clause).

¹⁷⁴ 9 U.S.C. § 2 (1994).

¹⁷⁵ Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

¹⁷⁶ *Id.* at 1148-49. A state court upheld an insurer's imposition of binding arbitration on the insured, even though the insureds received a copy of the policy containing the clause only after the premiums had been paid and coverage had begun. Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908 (Del. 1989). Cf. S. Energy

Similarly, numerous credit card companies and banks have begun imposing arbitration by sending their customers envelope stuffers, with their monthly statements, that state that all future disputes must be arbitrated rather than resolved through litigation.¹⁷⁷ Several courts have accepted that arbitration can be imposed in this fashion.¹⁷⁸

Employers are increasingly using handbooks to impose binding arbitration on their employees. While some employers require the employee to sign something acknowledging receipt of the entire handbook, not all require employees to sign or initial the arbitration clause in particular. Numerous courts have enforced arbitration, because it is called for in an employee handbook, not only where the employees sign an acknowledgment,¹⁷⁹ but also

Homes, Inc. v. Harcus, 754 So. 2d 622, 623–26 (Ala. 1999) (remanding suit to trial court, for determination as to whether arbitration agreement had been entered, where defendant had included arbitration clause in Home Owner's Manual placed in kitchen drawer in mobile home, and where defendant claimed mobile home purchasers had accepted arbitration by accepting services provided pursuant to the written warranty). For some contrary cases, see *supra* note 173.

¹⁷⁷ Such clauses have for example recently been issued by Citibank, First USA, MBNA, American Express, and J.C. Penney & Monogram Credit Card Bank of Georgia. (Clauses on file with author).

¹⁷⁸ See, e.g., *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000) (permitting bank to impose arbitration by mailing clause to customers, although customers did not sign any document); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) (imposing arbitration though change of terms notice was not fraudulent, unconscionable, or in violation of the Seventh Amendment). See also *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574 (W.D.N.C. 2000) (holding credit card holder barred from proceeding by class action, in arbitration, although card holder denied having received mailing prohibiting class actions, because "a letter properly addressed, stamped, and mailed may be presumed to have been received by addressee in the due course of mail"); *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 926 (N.D. Tex. 2000) (holding imposition of arbitration clause through change of terms notice provided adequate notice, was not unconscionable, and also did not violate Seventh Amendment). Cf. *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 287 (Cal. Ct. App. 1998) (refusing to enforce arbitration clause contained in change of terms "bill stuffer" provided to customers and credit card holders by bank, on ground that waiver was not sufficiently clear, but implying that clear waiver might have been enforceable).

¹⁷⁹ See, e.g., *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (upholding arbitration clause contained in employee handbook, even though handbooks are not considered contracts, where clause was said to be separate and distinct from rest of handbook, was set forth on a different page and introduced by bold type, had to be signed by the employee, and used a different tone and language than the rest of the handbook); *Blair v. Scott Specialty Gases*, 84 Fair Empl. Prac. Cas. (BNA) 1733 (E.D. Pa. Nov. 21, 2000) (upholding clause contained in handbook, where employee signed acknowledgement she had read that part of the handbook); *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 845–46 (S.C. Ct. App. 1999) (holding that employee agreed to binding arbitration by signing a Code of Conduct and Employee Handbook

where they do not.¹⁸⁰ In one extreme case, a court even held that employees could be bound by an arbitration clause they denied receiving, where the company could at most prove that the memoranda containing the clause were sent, and not that they were definitely received by the employees.¹⁸¹

E. Courts Generally Hold That the Party Opposing Arbitration Bears the Burden of Proof to Establish That the Clause Is Invalid Under a Federal Statute or Standard Contract Law Principles

Courts agree that the opponent of an arbitration clause bears the burden of showing that the clause is inconsistent with federal law or invalid as a matter of contract law. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁸² the Supreme Court stated "the burden is on Gilmer [the plaintiff/employee] to show that Congress intended to preclude a waiver of judicial forum for ADEA claims."¹⁸³ Numerous lower courts have also held that it is up to the party

Acknowledgment form, where clause stated that only arbitration portion of handbook is contract, and that employee accepted offer by continuing in his employment).

¹⁸⁰ See, e.g., *McClendon v. Sherwin Williams, Inc.*, 70 F. Supp. 2d 940, 942-43 (E.D. Ark. 1999) (holding binding arbitration clause contained in handbook distributed to employees was valid, even though it was not particularly explicit, because plaintiff accepted the offer of binding arbitration by remaining an employee); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 580-81 (Tex. Ct. App. 2000) (concluding employees were bound by arbitration clause contained in employment policy where they continued to work after receiving copy of policy containing clause.) However, few courts have also refused to enforce handbook provisions and other unsigned contracts. See *supra* note 173.

¹⁸¹ See, e.g., *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818, 820-21 (Cal. Ct. App. 2000) (holding employee was bound by arbitration clause contained in documents company's evidence showed were mailed to employee and not returned, even though employee stated she never received the documents, and company had no signed acknowledgment proving that employee had in fact received the materials). In a similar case, a federal district court in Texas held that credit card holders would be bound by the arbitration clause contained in a change in terms notice customers denied receiving. *Marsh*, 103 F. Supp. 2d at 916-19 (finding that because company had met its burden of showing amendment was mailed, customers must now prove non-receipt, and that their affidavits were insufficient evidence of non-receipt). See also *Cole v. Halliburton Co.*, No. CIV-00-0862-T, 2000 WL 1531614, at *2-3 (W.D. Okla. Sept. 6, 2000) (holding employee was bound by arbitration program described in materials purportedly mailed to his home by company, where company presented records of professional mailing service showing documents were sent to employee's house and not returned, and where employee admitted receiving two documents discussing program albeit not describing it in detail). These decisions raise a serious question of how a consumer or employee could ever prove they did not receive the amendment the company claimed to have mailed.

¹⁸² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

¹⁸³ *Id.*

challenging the arbitration clause to meet the burden of showing that it is unconscionable or otherwise void under contract law.¹⁸⁴ A few courts have even held that once a company presents evidence showing that it mailed material containing an arbitration clause to an employee or consumer, the alleged recipient bears the burden of proving that in fact she did not receive the documents.¹⁸⁵

F. Many Courts Have Held That Arbitration Clauses Should Be Broadly Construed, to Support the Federal Policy "Favoring" Arbitration

In determining the scope of the arbitration clause, many courts have held that the federal policy favoring arbitration means that the courts should interpret the scope of the clause broadly, to cover all claims that are conceivably covered by that clause. For example, in *Armijo v. Prudential Insurance Co. of America*,¹⁸⁶ the Tenth Circuit found that although it was not clear whether or not brokerage employees had consented to arbitrate their employment claims, the federal policy favoring arbitration meant that the clause must be given its broadest possible interpretation. The court explained: "Notwithstanding the ambiguity . . . (or perhaps more correctly, because of such ambiguity), we conclude that the most appropriate

¹⁸⁴ See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (stating, in upholding arbitration clause, that "[t]he party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability"); *Ex parte Napier*, 723 So. 2d 49, 53 (Ala. 1998) ("Under general principles of law, the party asserting the defense of unconscionability has the burden of proving unconscionability. If we shifted the burden of proof on the issue of unconscionability, because of the implications arising from alleged violations of the Alabama Constitution, then we would violate the principles of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) . . .").

¹⁸⁵ See, e.g., *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 916-19 (N.D. Tex. 2000) (finding that because company had met its burden of showing amendment was mailed, customers must now prove non-receipt, and that their affidavits were insufficient evidence); *Craig*, 100 Cal. Rptr. 2d at 821 (stating that once company produced evidence that it mailed documents containing details of arbitration program to employee, employee bore burden of showing that in fact the documents never arrived). See also *Cole*, 2000 WL 1531614, at *2 (stating that "[a] rebuttable presumption of delivery may be proved by circumstantial evidence, including the mailing practices utilized," and that it was appropriate to use this presumption to show that an employee received sufficient notice of employer's mandatory arbitration program).

¹⁸⁶ *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995).

construction . . . is to apply [the] arbitration provisions to employment disputes. . . ."187

G. Summary on Interpretation of Contractual Arbitration Clauses

The contrast between the jury trial waiver cases and the arbitration cases is stark. As shown above, although clauses mandating arbitration inherently eliminate the jury trial, courts are not applying the jury trial waiver analysis in the arbitration context. Instead of demonstrating a reluctance to find waiver of a jury trial, courts chant the mantra that arbitration is favored. Rather than using the knowing, voluntary and intelligent waiver standard, most courts interpreting arbitration clauses look only at whether, according to traditional objective contract principles, the contract includes an arbitration provision. The degree of conspicuousness, negotiability, bargaining power disparity, and other individualized factors are not typically deemed important in arbitration. In addition, the burden of proof is often placed on the party opposing arbitration, rather than on the party defending the waiver. Uninitialed, unsigned waivers that probably would not be found to be knowing, voluntary and intelligent are nonetheless often found sufficient modes of imposing arbitration. Finally, whereas courts interpret jury trial waivers narrowly, they often interpret arbitration clauses broadly. In fact, rather than demanding a higher level of consent for arbitration clauses than for other contracts, some courts are even requiring a *lower* level of consent, citing the supposed federal policy favoring arbitration.¹⁸⁸

¹⁸⁷ *Id.* at 798. See also *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92–93 (4th Cir. 1996) (holding that requests for arbitration may not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996) (holding that although clause "could have been drafted with more precision," the federal policy favoring arbitration required that it be interpreted broadly); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (interpreting clause broadly).

¹⁸⁸ See, e.g., *Harris*, 183 F.3d at 182 (finding inapplicable state cases providing "support for certain claims of procedural unconscionability that are based on inconspicuous or unclear contractual language, in particular, if the contracting parties have unequal bargaining power," because "[t]hese cases do not, however, concern arbitration clauses and are, therefore, inapposite to this case").

IV. HOW COURTS DO AND SHOULD RECONCILE SEVENTH AMENDMENT
JURY TRIAL WAIVER STANDARDS WITH ENFORCEMENT OF
MANDATORY ARBITRATION CLAUSES

A. *Lack of Attention and Divergent Results*

As has been noted, the dichotomy between the jury trial waiver and arbitration clause standards has received very little attention from either courts or commentators.¹⁸⁹ Mandatory arbitration clauses are frequently attacked on grounds such as unconscionability, or violation of a federal statute, but much less often on the ground that they violate the Seventh Amendment.

A few cases do draw on jury trial concerns to void arbitration clauses. This Author has located just one opinion in which a federal court refused to enforce a contractual arbitration clause on the ground that it violated the Seventh Amendment. In an unpublished decision from the bench, ultimately reversed in an unpublished court of appeals decision, a judge in the Eastern District of Virginia held that a contractual arbitration clause was unenforceable "because the plaintiffs . . . did not knowingly and voluntarily waive their rights to a jury trial."¹⁹⁰ In a related but not directly on-point decision, another federal court, addressing a statutory rather than a contractual imposition of arbitration, ruled that a Minnesota statute that required a foreign corporation to submit to binding arbitration deprived the corporation of its Seventh Amendment right to a jury trial on various

¹⁸⁹ For exceptions among commentators, see Reuben, *supra* note 4, at 1019–34 (discussing standard that should be used [under Constitution] to judge legitimacy of arbitration clause); Sternlight, *supra* note 40, at 56–69. See also Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996) ("Outside of the arbitration context, courts require a 'knowing and intentional' waiver of the right to a jury trial. Relevant factors include the clarity and prominence with which the language is expressed, the sophistication of the parties, whether or not they are represented by counsel, and their relative bargaining power."); Ware, *supra* note 141, at 216–17 (recognizing that the Supreme Court has not directly addressed the jury trial argument, but arguing that acceptance of the argument would require reversal of Supreme Court cases implementing the "contractual approach").

¹⁹⁰ *Sydnor v. AAPCO of Richmond West*, No. 3:00 CV 396 (E.D. Va. Sept. 27, 2000) (transcript of opinion issued from bench on file with author), *rev'd*, *Sydnor v. Conseco Fin. Serv. Corp.*, 2001 WL 223243, at *8 (4th Cir. Mar. 7, 2001) (*per curiam*) (stating that parties signed a clause stating they voluntarily and knowingly waived their jury trial rights, and rejecting argument that waiver of jury trial calls for a more demanding standard).

claims.¹⁹¹ Several other federal courts have addressed the issue in dicta. Most notably, a bankruptcy court discussed the conflict between jury trial rights and mandatory arbitration at great length, and using extremely colorful language. For example, the court stated, "The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic."¹⁹² Contrasting the situation when two equally sophisticated parties bargain at arms length to resolve disputes through arbitration, to the situation when companies impose such arbitration on consumers on a "take-it-or-leave-it" basis,¹⁹³ the court stated that "I would hold that in a consumer-transaction case involving a contract containing an arbitration provision, unless there is a showing that the consumer entered the arbitration agreement voluntarily, the contract will be unenforceable as an encroachment on the right to trial by jury."¹⁹⁴ The court nonetheless failed to void the agreement in dispute on that basis because plaintiff had failed to request a jury trial in his complaint.¹⁹⁵ Yet another district court mentioned the Seventh Amendment, and noted that it *might* be applicable, but ultimately voided the clause on other grounds.¹⁹⁶ Finally, several state courts have similarly drawn on a state constitutional right to a jury trial or to access to

¹⁹¹ See *GTFM, LLC v. TKN Sales, Inc.*, No. 00CIV0235BSJ, 2000 WL 364871, at *5 (S.D.N.Y. Apr. 10, 2000) (noting that the company did not consent to the arbitration).

¹⁹² *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

¹⁹³ *Id.* at 829. The court explained that whereas the Federal Arbitration Act was passed to permit merchants to adopt arbitration that they both found desirable, it is now being imposed on consumers who have no choice but to "give up constitutional rights long held precious to Western legal systems or give up access to the marketplace." *Id.* at 828. As to this shift in the usage of the FAA, the court provided a metaphor that will be meaningful to all those who have lived in the southeastern United States: "When introduced as a method to control soil erosion, kudzu was hailed as an asset to agriculture, but it has become a creeping monster. Arbitration was innocuous when limited to negotiated commercial contracts, but it developed sinister characteristics when it became ubiquitous." *Id.*

¹⁹⁴ *Id.* at 830. The court explained that it would look to whether the consumer was "apprised of his right to a trial by jury and . . . given an opportunity to accept or reject arbitration in a manner similar to the choice commonly given consumers either to purchase or refuse credit life or disability insurance." *Id.*

¹⁹⁵ *Id.* at 839-40.

¹⁹⁶ *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610-12 (D.S.C. 1998) (voiding arbitration clause imposed on employee on various grounds, including that clause was not accepted "knowingly and voluntarily," but resting this requirement on Title VII rather than on the Seventh Amendment), *aff'd on other grounds*, 173 F.3d 933 (4th Cir. 1999) (voiding clause on ground that company had breached agreement by issuing other arbitration rules).

court to either invalidate an arbitration provision,¹⁹⁷ or to interpret such a provision narrowly.¹⁹⁸

The vast majority of decisions, however, either entirely ignore the jury trial waiver cases in interpreting arbitration clauses, or else conclude that the jury trial doctrines are not relevant. For example, a few courts have recognized that a contract to arbitrate waives the jury trial right, but have not then explained their failure to apply the traditional jury trial waiver criteria to determine whether or not a waiver should be found.¹⁹⁹ In one such case,

¹⁹⁷ *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 289–91 (Cal. Ct. App. 1998) (drawing on right to jury trial, under California constitution, to conclude that bank customers, who were sent envelope stuffer "change in terms notice" calling for arbitration, did not agree to arbitration because waiver was not unambiguous and unequivocal). The court explained,

We find no unambiguous and unequivocal waiver of the right to a jury trial either in the language of the change of terms provision or in any other part of the original account agreements. Nor do we find an unambiguous and unequivocal waiver in any customer's failure to close or stop using an account immediately after receiving the "bill stuffers" because, as even the trial court concluded, the notice contained in the "bill stuffer" was "not designed to achieve 'knowing consent'" to the ADR provision. . . . The wording of the "bill stuffer" itself is far from the direct, clear and unambiguous language required to alert a customer that by maintaining the status quo he or she is waiving an important constitutional right.

Id. at 290–91. *See also* *Villa Milano Homeowners Ass'n v. Il Davorge*, 102 Cal. Rptr. 2d 1, 7 (Cal. App. 4 Dist. 2000) (mentioning jury trial right in refusing to enforce arbitration clause that was buried deep in restrictive covenants used by developer to protect against claims by home owners); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 929 (Ala. 1997) (remanding question of validity of arbitration clause to trial court and observing, "[w]e must emphasize that any arbitration agreement is a waiver of a party's right under Amendment VII of the United States Constitution to a trial by jury and, regardless of the federal courts' policy favoring arbitration, we find nothing in the FAA that would permit such a waiver unless it is made knowingly, willingly, and voluntarily"); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992) (en banc) (holding agreement to arbitrate medical malpractice claim unenforceable, and observing "there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived"). Note that the Alabama Supreme Court did not explain why the federal right to a jury trial, rather than any state constitutional right, would apply to an action brought in state court.

¹⁹⁸ *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 642 (Fla. 1999) (taking note of "right to trial by jury" in concluding that arbitration clause between home owner and building contractor should be narrowly construed so that it did not cover tort claim brought against contractor).

¹⁹⁹ *E.g.*, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (rejecting plaintiff's claim that he was denied Seventh Amendment right when he was compelled to arbitrate, stating "the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration agreement", but failing to apply standard waiver analysis); *United States v. Am. Soc'y of Composers*, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) (rejecting jury trial claim

Green Tree Financial Corp. v. Vintson,²⁰⁰ the Alabama Supreme Court observed that mobile home purchasers Johnny and Bonnie Vintson argued that "they did not knowingly, willingly, or voluntarily agree to waive their right to a jury trial."²⁰¹ However, without discussing the argument in depth, the court simply rejected it on the ground that competent adults having the ability to read and understand contracts are normally held to have done so, when they signed the agreement.²⁰² Yet, the court did not consider whether a higher standard of knowingness and voluntariness is required for waiver of a constitutional right, as discussed earlier.²⁰³ In a subsequent decision the Alabama Supreme Court purported to examine whether the plaintiff mobile home purchaser "knowingly, voluntarily, and willingly waived his right to a jury trial" by agreeing to arbitration, but upheld a waiver that most courts would likely have rejected, using the traditional jury waiver test.²⁰⁴ Some courts have stated, without extensive analysis, that they need not employ the traditional waiver standard because arbitration is "favored," under federal law.²⁰⁵ As one district court explained,

in part because petitioner supposedly agreed to arbitration process when he joined Society of Composers, but failing to consider whether this was knowing, voluntary, intelligent waiver). *See also* *Sydnor v. Conesco Fin. Serv. Corp.*, 2001 WL 223243, at *3 (4th Cir. Mar. 7, 2001) (per curiam) (finding jury trial right was waived, through signature of document, but failing to explain non-applicability of traditional waiver analysis).

²⁰⁰ *Green Tree Fin. Corp. v. Vintson*, 753 So. 2d 497 (Ala. 1999).

²⁰¹ *Id.* at 502. The right asserted presumably arose under the Alabama rather than the U.S. Constitution, as the suit was brought in state rather than federal court.

²⁰² *Id.*

²⁰³ As was noted above, this higher standard would apply only if, as I argue, the provisions of the general Alabama constitution are not preempted by the FAA. *See supra* note 8.

²⁰⁴ *Johnnie's Homes, Inc. v. Holt*, No. 1991404, 2001 WL 29263, at *4 (Ala. Jan. 12, 2001) (holding illiterate mobile home purchaser with sixth grade education knowingly, voluntarily, and willingly waived right to jury trial in signing contract containing arbitration provision, although he claimed he was not even given arbitration provision nor notified that contract contained such a provision).

²⁰⁵ *See, e.g.,* *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285, 287 (9th Cir. 1988) (stating arbitration is favored and further stating that issue of whether there was a knowing and intelligent waiver "is simply beside the point"); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 337, 339 (7th Cir. 1984) (noting arbitration is favored and explaining that "though perhaps not contemplated by the Piersons when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate"); *Blair v. Scott Specialty Gases*, No. 00-3865, 2000 WL 1728503, at *4, 7 (E.D. Pa. Nov. 21, 2000) (stating that arbitration is favored and concluding employee waived jury trial right by signing acknowledgement of receipt of handbook calling for arbitration, but failing to apply traditional test for waiver); *Bosinger v. Phillips Plastics Corp.*, 57 F. Supp. 2d 986, 989-90 (S.D. Cal. 1999)

Supreme Court precedent indicates that the Seventh Amendment does not present a serious obstacle to arbitration. In fact, that precedent makes clear that arbitration clauses are to be broadly construed and doubts are to be resolved in favor of arbitration. . . . If the Seventh Amendment presented a serious limitation on the duty to arbitrate, arbitration provisions would have to be narrowly construed.²⁰⁶

Yet such courts fail to address the possible invalidity of a federal law that is inconsistent with the U.S. Constitution.²⁰⁷ In contrast, as will be discussed in detail, a few courts, led by the Seventh Circuit, have purported to solve the conflict, asserting that by "agreeing" to arbitrate, persons agree to have their dispute resolved in a non-Seventh Amendment forum, and that the court therefore need not apply normal waiver criteria.²⁰⁸

Finally, in a most interesting but extremely odd turn of affairs, one court and one commentator have suggested resolving the tension between the tough standard protecting waiver of the jury trial and the more lax standard for interpreting arbitration agreements by applying the more lax arbitration standard to contractual jury trial waivers, thereby making it just as easy to take away persons' jury trial rights outside the arbitration context as it has become in the arbitration context. In enforcing a jury trial waiver in a non-arbitration case the Connecticut Supreme Court stated as follows:

We begin by noting that jury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the facts of the case. We have explicitly stated that "[a]rbitration affords a contractual remedy with a view toward expediting disputes." (citation omitted) Arbitration is favored because it is intended to avoid the formalities, delay, expense and vexation of ordinary litigation. (citations omitted). Arbitration agreements illustrate the strong public policy favoring freedom of contract and the efficient

(rejecting independent contractor's argument that although he signed agreement calling for arbitration he did not knowingly waive jury trial right, and explaining that arbitration is favored and that plaintiff failed to provide case law supporting his position that agreement must be knowing); *Parsley v. Terminix Int'l Co.*, No. C-3-97-394, 1998 WL 1572764, at *5 (S.D. Ohio Sept. 15, 1998) (mentioning that plaintiff asserted a jury trial right but failing to apply Seventh Amendment standard and stating that Supreme Court has mandated questions regarding enforceability of arbitration clauses be resolved in favor of arbitration). *See also* *Henry v. Gonzalez*, 18 S.W.3d 684, 691 (Tex. App. 2000) ("[Plaintiff's] public policy contentions are unfounded because well established caselaw favors mandatory arbitration and holds that arbitration does not deny parties their right to a jury trial, as a matter of law.").

²⁰⁶ *Burlington N.R.R. v. Soo Line R.R.*, 162 B.R. 207, 214 (D. Minn. 1993).

²⁰⁷ *See infra* text accompanying notes 213–23.

²⁰⁸ *See infra* text accompanying notes 224–68.

resolution of disputes. These policies are also furthered by a jury trial waiver clause.²⁰⁹

By contrast, the Missouri Supreme Court recognized that while freedom of contract concerns might justify both arbitration and jury trial waivers,²¹⁰ "more than contract law is involved,"²¹¹ stating that "the validity of the [jury trial] waiver here depends on whether the defendant knowingly and voluntarily consented to relinquish her right to a jury trial."²¹²

B. No Legitimate Rationale Justifies Sidestepping Traditional Analysis in Arbitration Cases

How can this disparity between the jury trial waiver and arbitration standards be justified? I argue it can not.

1. The Federal Policy "Favoring" Arbitration Cannot Contravene a Federal Constitutional Right

As noted, several courts have stated that the "knowing, voluntary and intelligent" Seventh Amendment waiver standard is inappropriate to arbitration because the federal policy favoring arbitration compels them to use the lower contract law standard.²¹³ This is, quite simply, a non-explanation, because the Constitution is the Supreme Law of the Land.²¹⁴

²⁰⁹ *L&R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 753 (Conn. 1998). See also Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 98-99 (2000) (recognizing that, "[a]s a theoretical matter, the elevated status of arbitration agreements is difficult to justify," but arguing that jury trial waivers should be allowed according to the more liberal test afforded to arbitration clauses).

²¹⁰ In *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624 (Mo. 1997) (en banc), the court took note of parties' interest in "freedom of contract" and stated,

Our courts have held that a party may contractually relinquish fundamental and due process rights. Arbitration agreements are an example where the courts have upheld the parties' right to contractually agree to relinquish substantial rights. In every arbitration agreement, the parties not only agree to waive a jury trial but also to give up their right to present their claim to any judicial tribunal deciding the case.

Id. at 626.

²¹¹ *Id.* at 627.

²¹² *Id.*

²¹³ See *supra* text accompanying notes 205-07.

²¹⁴ *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.").

The Seventh Amendment jury trial right supercedes any policy emanating from a federal statute.²¹⁵

Moreover, although Professor Ware has asserted that recognizing the relevance of the Seventh Amendment standard "would require reversal of [Supreme Court] cases implementing the contractual approach, and would require a holding that the FAA is unconstitutional insofar as it requires courts to enforce arbitration agreements 'save upon such grounds as exist at law or in equity for the revocation of any contract,'" ²¹⁶ this statement is too extreme. Of course it is true that recognizing the applicability of the Seventh Amendment would rein in some courts' enthusiasm for mandatory binding arbitration. However, the Seventh Amendment, even where applicable, does not void all aspects of the supposed federal policy favoring binding arbitration.

Although Professor Ware has taken *Doctor's Associates, Inc. v. Casarotto*²¹⁷ to be "another ringing endorsement of the contractual approach to arbitration,"²¹⁸ its holding is far narrower and thus its reversal would not

²¹⁵ Moreover, it is not clear that any federal policy favors *nonconsensual* arbitration. See Sternlight, *supra* note 3, at 660–63. See also Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (arbitration has been "distorted" and is now being used by powerful to secure advantages over weak); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) (explaining that whereas arbitration was originally espoused as a tool to be used voluntarily, between entities sharing a community, it has now been expanded to cover situations including great power disparities). Thus, it is arguable that if the Seventh Amendment test is used to determine consent, the federal policy would not favor any arbitration clause that is not valid under the Seventh Amendment.

²¹⁶ Ware, *Consumer Arbitration*, *supra* note 141 at 217.

²¹⁷ 517 U.S. 681 (1996).

²¹⁸ Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001 (1996). See also Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137 (1996) (stating that "the Court's arbitration decisions over the last twenty years have been remarkably faithful to the principle that courts should relegate claims to arbitration when, and only when, contract law analysis would call for that). Some of the other cases relied on by Professor Ware are *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (stating that parties can contract to allow arbitrator to award punitive damages); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that consumer's agreement to arbitrate is enforceable, although void under state law, because state law is preempted by the FAA); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20–23 (1991) (holding that employee's agreement to arbitrate claims under Age Discrimination in Employment Act is not void under that statute); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476–77 (1989) (holding that parties could choose, in their contract, to be bound by state rather than federal arbitration

be required. *Casarotto* holds only that a state statute that is targeted specifically to void arbitration agreements, and not contracts in general, is preempted by the FAA, even if the purpose of the law may have been to promote the knowing choice of arbitration.²¹⁹ The jury trial argument simply was not considered by the Court, and it would not be logically inconsistent for the Court to preempt notice requirements contained in state law while still requiring courts to look for the knowing, intelligent waiver compelled by the Seventh Amendment. The Court also would not have to reverse any of its other decisions, including its holding in *Gilmer* that claims brought under the ADEA are not necessarily exempt from binding arbitration,²²⁰ and its holding in *Terminix* that state statutes voiding predispute arbitration clauses are generally preempted by the FAA.²²¹

Nor, in my view, would application of the Seventh Amendment analysis clearly be inconsistent with the FAA's statutory language requiring that courts enforce pre-dispute arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."²²² While some courts have construed that language to support only common law contractual defenses such as unconscionability and fraud, there is no reason why the principles of contract interpretation deriving from the Seventh Amendment would not be considered to be grounds "at law or in equity." Any contract calling for waiver of a constitutional right, including a jury trial right, must be examined to ensure that it is voluntary, knowing and intelligent.

However, if Professor Ware's more narrow interpretation of the FAA prevails, and courts interpret Section 2 of the FAA to foreclose use of the standard Seventh Amendment waiver analysis, then he is correct that Section 2 is unconstitutional. Congress does not have the power to make binding arbitration agreements immune to attack under the Seventh Amendment.²²³

law). Ware, *Employment, Arbitration and Voluntary Consent supra* note 140 at 137 n.275.

²¹⁹ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996). The state law in question had provided that an arbitration clause be "typed in underlined capital letters on the first page of the contract." MONT. CODE ANN. § 27-5-114(4) (1993).

²²⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

²²¹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

²²² 9 U.S.C. § 2 (1994).

²²³ Some might argue that just as Congress may order certain disputes to be resolved in administrative agencies, in which jury trials are not available, so too may it order that courts enforce binding arbitration clauses, even when not agreed to knowingly, voluntarily, and intelligently. However, such an argument would be unconvincing, at least if applied on a widespread basis and not to a limited set of claims. While it is true that the Court has permitted certain disputes to be resolved by administrative agencies, without juries, the Court has made clear that only "public" and not "private" rights may be determined in this fashion. Compare *Thomas v. Union Carbide Agric. Prods. Co.*, 473

2. It is Circular and Illegitimate to State That Because Disputants Contractually Waived Their Right to Trial, the Seventh Amendment Test for Waiver Need Not be Applied

Several decisions have been read to support an argument that by waiving the right to participate in a constitutionally protected forum a person waives the right to a jury trial or to an Article III hearing, even though the standard jury trial waiver test may not have been met. On its face, this rationale lacks plausibility, due to its circularity. Rephrased, the explanation would provide "We need not determine whether you knowingly, voluntarily, and intelligently waived your right because you previously waived your right to have us use that test, even though your prior waiver itself may not have been knowing, voluntary, and intelligent." This Section will analyze these cases in detail.

In the leading case of *Geldermann, Inc. v. Commodity Futures Trading Commission*,²²⁴ the Seventh Circuit reversed the district court's finding that Geldermann had not "knowingly, intentionally and voluntarily" waived its

U.S. 568, 593–94 (1985) (holding that private right might be so closely intertwined with public regulatory scheme as to be appropriate for agency resolution), and *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977) (holding that congressionally created "public" right to occupational health and safety could be resolved without jury, in administrative agency), with *Granfinanciera S.A., v. Nordberg*, 492 U.S. 33 (1989) (holding that jury trial was available when bankruptcy trustee sued party in bankruptcy court over private right); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding unconstitutional, under Article III, that portion of the bankruptcy code which purported to allow a debtor to bring private-law claims, such as breach of contract suits, against a creditor in a non-Article III court). While the line drawn in this context between "public" and "private" rights is far from bright, it is clear that the Court would not permit Congress to eliminate the jury trial by ordering that all claims be resolved by administrative agencies. Nor would the Court likely permit Congress to shunt all federal statutory claims to administrative agencies, as it has recognized that some statutory claims should be considered private in that they closely resemble common law claims. *Granfinanciera*, 492 U.S. 33, 55–56 (1989) (discussing bankruptcy trustee's right to recover a fraudulent conveyance). Thus, it seems that Congress cannot, without violating the Seventh Amendment, empower courts to order binding arbitration of all claims or even all federal statutory claims, absent the knowing, voluntary, and intelligent waiver of the jury trial right. See generally *Sternlight*, *supra* note 40, at 72–76 (discussing Supreme Court case law distinguishing between which claims can appropriately be resolved by non-Article III courts, without juries); *Sward*, *supra* note 8, at 1089–1108 (discussing distinction drawn by court between "public" and "private" rights, and arguing that Court's approach is inconsistent with Seventh Amendment).

²²⁴ *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987).

right to an Article III forum and a jury trial,²²⁵ instead concluding that Geldermann had consented to proceed in arbitration, a non-Article III forum, and thus could not complain about the lack of a jury trial.²²⁶ "In a non-Article III forum the Seventh Amendment simply does not apply."²²⁷ Two subsequent district court decisions in the Seventh Circuit applied this analysis to conclude that a company's imposition of mandatory arbitration did not violate an employee's jury trial rights.²²⁸ District courts in Texas²²⁹ and Mississippi²³⁰ employed the same concept to conclude that credit card holders had waived their right to a jury trial by using their credit cards after receiving a "change of terms" notice requiring them to submit future disputes

²²⁵ *Id.* at 316.

²²⁶ *Id.* at 316–21. The court also considered, but rejected, the argument that the purported waiver of Article III rights might be invalid because it impinged on non-waivable separation of powers interest. *Id.* at 321–23.

²²⁷ *Id.* at 323. In reaching this conclusion the court drew substantially on *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), a case in which the Court found no violation of Article III rights where federal law required pesticide companies to use binding arbitration to resolve disputes over compensation for shared data submitted to a federal agency.

²²⁸ *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1470–71 (N.D. Ill. 1997) (rejecting plaintiff's Article III and Seventh Amendment claims). As to the jury trial claim the court stated,

The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.

Id. at 1471. *See also* *Illyes v. John Nuveen & Co., Inc.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996) ("Additionally, because plaintiff has voluntarily consented to arbitration, he has waived any right he may have had to a full trial before an Article III court. Without a right to an Article III forum, he has no Seventh Amendment claim.") (citation omitted).

²²⁹ *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 920–21 (N.D. Tex. 2000). The court explained,

Plaintiffs agreed to submit to arbitration because they assented to the terms of their Cardmember Agreement. Thus, by agreeing to arbitration they necessarily waived: (1) their right to a judicial forum, and (2) the concomitant right to a jury trial. . . . The Seventh Amendment right to a trial by jury is necessarily incident to, and predicated upon the right to a federal judicial forum. Thus, a valid arbitration provision, which waives the right to resolve a dispute through litigation in a judicial forum, implicitly waives the attendant right to a jury trial. Therefore, the Seventh Amendment is not implicated by a contractual provision that precludes access to an Article III forum.

Id. at 921.

²³⁰ *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001) ("If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.").

to binding arbitration. Courts have also found a waiver of jury trial rights where parties agreed to submit their disputes to a labor System Board of Adjustment,²³¹ to a bankruptcy court,²³² or to an Article I Claims Court.²³³

However, while these decisions set out the sensible principle that a person may waive the right to a jury trial by agreeing to resolve disputes in a non-jury setting, on close reading not all of the decisions actually provide that a court should ignore the normal jury trial standard in determining whether the party selected a non-jury forum. In fact, one of the "forum selection" decisions, *Seaboard Lumber Co. v. United States*,²³⁴ expressly applies the "voluntary and knowing" jury trial waiver test.²³⁵ It states, "The acceptance of contract provisions providing for dispute resolution in a forum where there is no entitlement to a jury trial may satisfy the 'voluntary' and 'knowing' standard."²³⁶

While the other decisions do not expressly apply the "knowing, voluntary and intelligent" test, only *Marsh* and *Coates* come close to stating that the traditional test is irrelevant to the determination of whether a party has consented to have disputes resolved in a forum to which the Seventh

²³¹ *N.W. Airlines, Inc. v. Air Line Pilots Ass'n*, 373 F.2d 136, 142 (8th Cir. 1967), cert. denied, 389 U.S. 827 (1967) ("Here the parties by their contract providing for final determination of minor disputes by a Systems Board authorized by [45 U.S.C.A.] § 184 waived any constitutional right they might have had to a jury trial.")

²³² *In re Balsam Corp.*, 185 B.R. 54 (E.D. Mo. 1995). The court explained that "[a] litigant may also waive its Seventh Amendment right to a jury trial by consenting explicitly or tacitly to the jurisdiction of the bankruptcy court." *Id.* at 58. The court found that the debtor agreed to the jurisdiction of the bankruptcy court by accepting the Sales Agreement requiring that disputes would be so resolved. *Id.* at 58-59.

²³³ *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (holding that company agreed to relinquish jury trial right by accepting contract calling for resolution of disputes in Article I claims court).

²³⁴ *Id.*

²³⁵ *Id.* (stating that while litigants may waive their right to a jury trial either expressly or impliedly, such waiver must be voluntary and knowing based on the facts of the case).

²³⁶ *Id.* The court went on to conclude that appellants, all "timber companies that individually contracted with the United States to purchase timber from National Forests," did "knowingly and voluntarily" agree. *Id.* at 1561. While the requirement that disputes be presented to the Claims Court was presented on a "take it or leave it" basis, the court explained that fact was not controlling in that "Respondents were not compelled or coerced into making the contract [with the government]." *Id.* at 1564-65 (quoting *United States v. Wunderlich*, 342 U.S. 98, 100 (1951)). The court also observed that appellants recognized that the claims court would not provide for a jury trial, absent adoption of new rules. Given the competence of the parties, the court's conclusion that appellants waived their jury trial rights is consistent with the line of jury trial waiver cases discussed earlier in this Article.

Amendment would not apply.²³⁷ The other cases do not clearly discuss the waiver standard that must be used to uphold an arbitration clause.²³⁸

Nor is it clear that all of these cases would have come out differently had the courts explicitly considered whether the decision to resolve disputes in a non-Article III forum was knowing, voluntary and intelligent. In *Geldermann*, for example, the party claiming it was entitled to a jury trial was, by its own account, "the largest commodity broker in the United States."²³⁹ As a precondition of joining the Chicago Board of Trade this company agreed to be bound by the rules and regulations of that organization.²⁴⁰ These rules were subsequently amended to mandate binding arbitration, and the company was well aware of the change.²⁴¹ Moreover, the company had previously arbitrated a dispute.²⁴² Given these facts, it is not obvious that the waiver was not "knowing, voluntary, and intelligent" under the traditional four factor test.²⁴³ Similarly, *Northwest Airlines, Inc.*²⁴⁴

²³⁷ *Marsh* is a rather odd decision in that the court seemingly fails to recognize that the knowing, voluntary, intelligent standard is traditionally used in contractual jury trial waivers. Instead, the court purportedly distinguishes all the cases cited by plaintiff, characterizing them as irrelevant because they involved criminal matters, non-contractual jury trial waivers, or collective bargaining agreements. *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000). *Coates* states that no "clear and unmistakable" waiver must be shown, as would be required if the Seventh Amendment were at issue, but does not explain what standard must instead be used to determine whether the individual has selected arbitration over litigation. *Bank One v. Coates*, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001).

²³⁸ See *Geldermann, Inc. v. Commodity Futures Trading Comm'n.*, 836 F.2d 310 (7th Cir. 1987); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 373 F.2d 136 (8th Cir. 1967); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. Ill. 1997); *Illyes v. John Nuveen & Co.*, 949 F. Supp. 580 (N.D. Ill. 1996); *In re Balsam Corp.*, 185 B.R. 54 (E.D. Mo. 1995).

²³⁹ *Geldermann*, 836 F.2d at 317.

²⁴⁰ *Id.* at 317-18.

²⁴¹ *Id.* at 318. In fact, there was substantial publicity over the adoption of the mandatory arbitration rule, which was fought administratively and through litigation by the CBOT. *Id.* at 312-15.

²⁴² *Id.* at 320-21 (calling Geldermann's objection "belated" and "self-serving," and emphasizing that Geldermann had previously submitted a claim to arbitration and was content with that forum until it lost).

²⁴³ Geldermann's strongest argument is that the participation was mandatory. However, the court emphasized that Geldermann could have chosen to resign its membership in the CBOT. *Id.* at 319 n.9. While this Author might have resolved the case differently, for this reason, the conclusion is not inconsistent with other courts' decisions in jury trial waiver cases, given the great wealth and power and sophistication possessed by Geldermann. Cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 992 n.414 (1988) (referring to *Geldermann* and stating "to call this a 'waiver' is to render the concept

involved the collective bargaining agreement entered into between Northwest Airlines and the Air Line Pilots Association. It is hard to imagine how Northwest Airlines could have shown that its decision in this agreement to submit certain disputes to a non-jury forum was not knowing and intelligent.²⁴⁵ In *In re Balsam Corp.*,²⁴⁶ the party claiming a jury trial was Southwest Recreational Industries, Inc., a company which agreed to pay approximately \$3.5 million for debtor's assets.²⁴⁷ Again it would be very hard for such a company to show the type of imbalance of power or ignorance normally required to invalidate a jury trial waiver.

The four district court cases all reach more questionable results. Both *Cremin* and *Illyes* involved individual employees, rather than large companies, and both involved arbitration that was imposed on the employee on a mandatory basis, in a form contract.²⁴⁸ In *Cremin* the employee signed a Form U-4 in which she agreed to arbitrate all disputes between her and her firm that were required to be arbitrated under the rules of NASD.²⁴⁹ In *Illyes* the employee signed an earlier version of Form U-4 which agreed to comply with the NASD rules (which called for arbitration), but the Form U-4 itself did not mention arbitration.²⁵⁰ Although both employees were relatively sophisticated, both clauses are questionable, given the imbalance of power, the lack of clarity of the waiver (particularly in *Illyes*), and the non-negotiability of the waiver. Still, the district courts handling these employment disputes did not go so far as to conclude that the clauses were valid although not entered knowingly, voluntarily, or intelligently.

The most problematic cases are *Marsh*,²⁵¹ and *Bank One, N.A. v. Coates*.²⁵² *Marsh* was a putative class action brought by credit card holders against the issuing bank to contest late fees and other assessments. The defendant argued that the claims must be arbitrated, in that some of the card

meaningless"); Sternlight, *supra* note 40, at 33 (critiquing Geldermann's conception of voluntary).

²⁴⁴ Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 373 F.2d 136 (8th Cir. 1967).

²⁴⁵ Specifically, Northwest Airlines would have a hard time showing lack of bargaining power or sophistication, or that the collective bargaining agreement was imposed on it as a contract of adhesion.

²⁴⁶ *In re Balsam Corp.*, 185 B.R. 54 (E.D. Mo. 1995).

²⁴⁷ *Id.* at 55-56.

²⁴⁸ *Illyes v. John Nuveen & Co.*, 949 F. Supp. 580, 580 (discussing claim brought by bond analyst against his former employer); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1460 (examining claim brought by registered securities representative against her employer).

²⁴⁹ *Cremin*, 957 F. Supp. at 1462-63.

²⁵⁰ *Illyes*, 949 F. Supp. at 582.

²⁵¹ *Marsh v. First USA Bank*, 103 F. Supp. 2d 909 (N.D. Tex. 2000).

²⁵² *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001).

holders' initial Cardmember Agreements required arbitration,²⁵³ and that the other card holders were required to arbitrate by an amendment to the Cardmember Agreement subsequently imposed by the company.²⁵⁴ When both sets of card holders asserted that requiring them to arbitrate would deprive them of their Seventh Amendment right to a jury trial, and that defendant could not show that they had "clearly and unmistakably" waived their right,²⁵⁵ the court rejected the argument stating that all the plaintiffs had waived such rights by "agreeing to arbitration."²⁵⁶ However, it seems fairly clear that if the court had applied the "knowing, voluntary, intelligent" standard it would not have found a valid waiver of the jury trial right. Although the district court does not provide a great deal of information regarding how the Cardholders Agreement was imposed, it is typical that such Agreements are sent to Cardholders at some point after they have applied for, and perhaps received, the credit card. The arbitration clause is usually one of many, contained in small print in a lengthy brochure. No signature or initials are required. No negotiation of the clause is permitted. Thus, taking into account the non-conspicuousness and non-negotiability of the clause, as well as the relative lack of sophistication and bargaining power of the cardholders, the clause would likely fail the Seventh Amendment test.²⁵⁷ It is very doubtful courts would employ such a presumption when interpreting a Seventh Amendment jury trial waiver.

In *Bank One*, the defendant in the federal suit, Clarence Coates, had filed suit in state court together with thirty-seven others alleging claims relating to their purchase and financing of a home satellite system.²⁵⁸ Bank One brought a suit to compel arbitration in federal court against each of the state court plaintiffs.²⁵⁹ The original Credit Application and Security Agreement did not call for arbitration but permitted Bank One to make amendments to the agreement.²⁶⁰ Some time later, Bank One sent a notice to its cardmembers, including Coates, announcing that the agreement terms would be modified by an arbitration clause.²⁶¹ Cardholders were not required to

²⁵³ *See id.* at 915.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 920–21.

²⁵⁶ *Id.* at 921.

²⁵⁷ The card holders who were sent to arbitration by a subsequent amendment of the Cardholder Agreement have an even stronger claim, in that defendant could not even prove they had actually received the amendment, without the benefit of a presumption that clauses which are likely mailed are likely received. *Id.* at 916–19.

²⁵⁸ *Bank One v. Coates*, 125 F. Supp. 2d 819, 821 (S.D. Miss. 2001).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 25–26.

²⁶¹ *Id.* at 826.

sign any provision but were provided an opportunity to reject the new terms if they did so in writing by a certain date.²⁶² When Coates argued, in part, that the arbitration clause was invalid because Bank One could not "demonstrate . . . a clear and unmistakable waiver" of his Seventh Amendment right to a jury trial, the court held the standard was inapplicable. Quoting *Marsh*²⁶³ the court explained

The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.²⁶⁴

Yet, as in *Marsh*, it appears that had the court applied the "knowing, voluntary, and intelligent" standard to determine whether Coates relinquished his jury trial in favor of arbitration, it likely would have concluded he did not. Although the language of the original agreement and the amendment was purportedly clear, the print in both documents was "small if not 'tiny,'" the court does not give reason to believe negotiation was permitted, no signature or initials were required, and although the court provides no background on Mr. Coates, there was likely a significant imbalance of power and sophistication.²⁶⁵

The absurdity of the argument that persons waive their Seventh Amendment rights by "agreeing" to arbitration, even if not knowingly, voluntarily, and intelligently, can be further demonstrated by a couple of thought experiments, one criminal and one civil. As we all know, *Miranda v. Arizona*²⁶⁶ interprets the Constitution to require police to read prisoners their rights before subjecting them to interrogation.²⁶⁷ Imagine, however, that the police take a person into custody, hand the person a multi-page form stating, among other things, "I knowingly waive all my rights under the U.S. Constitution," and demand that the person sign the form, stating it is a "mere formality." Having secured the signature, the police go on to conduct the interrogation, without having informed the person of the rights to an attorney, to remain silent, and that anything said might be used against them in court. Does anyone have a doubt but that the results of this interrogation would be suppressed?

²⁶² *Id.*

²⁶³ *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000).

²⁶⁴ *Id.* at 834.

²⁶⁵ *Id.* at 831-34.

²⁶⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁶⁷ *Id.* at 444-45.

Similarly, imagine a scenario in which a credit card company sends all its customers a notice which reads, in fine print, in a paragraph buried in a document covering other matters, "By continuing to use your credit card you agree that with respect to all claims arising between you and the Company, you waive any rights you may have had to present claims arising under the U.S. Constitution." Could the company then argue that the customer had waived any right to a jury trial, or to notice and a hearing under the Due Process clause? Surely such a waiver would only be valid, if at all, if it met the knowing, voluntary, intentional test for waivers of constitutional rights. The company could not likely successfully argue that the customer had waived such rights by agreeing to participate in a non-constitutional transaction.

One reader of an early draft of this article suggested that the arbitral waiver of jury trial rights is no less acceptable than the waiver which inevitably occurs when a plaintiff, perhaps unwittingly, fails to file her claim within the statute of limitations period. However, this analogy is problematic. While it is of course true that a person is not entitled to a jury trial on a clearly inadequate claim,²⁶⁸ the arbitration clause purports to deprive persons of a jury trial forum for all claims, valid or invalid.

In sum, it makes no sense to say that a contract agreeing to waive a jury trial, in favor of arbitration or any other non-Article III forum, should be judged by any standard other than the traditional test for legitimate waiver of the jury trial right. No court has come up with a plausible rationale for applying anything but the "knowing, voluntary and intelligent" test to determine whether the Seventh Amendment right has been waived. Thus, in those cases brought in federal court in which a jury trial would otherwise have been available, courts should use the traditional jury trial waiver standard to determine whether the arbitration clause is valid.

V. IMPLICATIONS OF SEVENTH AMENDMENT FOR BINDING ARBITRATION

A. Accepting the Relevance of the Seventh Amendment Will Not Entirely Prohibit Companies from Imposing Binding Arbitration

Some may suggest that applying the Seventh Amendment to arbitration clauses would be undesirable, from a policy perspective. They may fear that arbitration would be substantially curtailed, and that parties and the justice

²⁶⁸ See, e.g., *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319–22 (1902) (holding that District of Columbia's rule allowing for summary disposition of case did not deprive claimant of jury trial right, where claimant failed to submit affidavit showing there was a real issue for trial).

system will be detrimentally impacted. However, such fears are not well placed. First, as a matter of fact, applying the Seventh Amendment will not entirely eliminate mandatory binding arbitration. Second, to the extent the Seventh Amendment does eliminate certain uses of mandatory binding arbitration, this will be desirable from a policy perspective. The practices that will be eliminated are those that are most unfair. This section will also examine implication of the Seventh Amendment for the continued viability of the Supreme Court's arbitration case law, including *Gilmer*.

1. *The Seventh Amendment Does Not Always Apply*

As noted earlier, there are many disputes to which the Seventh Amendment will not apply. It will only apply to disputes that are brought in federal court.²⁶⁹ Further, even in federal court it will only apply to those disputes brought at "common law," in which a jury trial would otherwise have been available.²⁷⁰ Thus, recognizing the applicability of the Seventh Amendment to consumer and other disputes will not entirely eliminate mandatory arbitration of those kinds of disputes.²⁷¹

2. *Even When the Seventh Amendment Applies, It Will Permit the Enforcement of Binding Arbitration Agreements So Long As All Parties Choose Arbitration "Knowingly, Voluntarily, and Intentionally"*

As Section II's discussion of the jury trial waiver cases shows, applying the Seventh Amendment to a waiver by no means requires that the waiver will be invalidated. Courts have been quite willing to uphold jury trial waivers, so long as they were entered "knowingly, voluntarily and intentionally."²⁷² Thus, in the arbitration context, companies would not be foreclosed from entering into arbitration agreements with their consumers and employees, but would merely have to make sure that the agreements met the Seventh Amendment criteria. It need not be unduly burdensome for companies to comply with the Seventh Amendment.²⁷³

²⁶⁹ See *supra* text accompanying notes 16–17.

²⁷⁰ See *supra* text accompanying notes 18–21.

²⁷¹ Of course, if jury trial rights protected under state constitutions and statutes can be used to invalidate arbitration clauses, see *supra* note 8, many more arbitration clauses will be subject to invalidation.

²⁷² See *supra* text accompanying notes 90–94.

²⁷³ See, e.g., *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 951–52 (N.D. Ind. 2000) (pointing out that companies can take steps to make sure that their

What would application of the Seventh Amendment mean to mandatory arbitration from a practical perspective? The clauses most likely to be upheld would be those that are conspicuous, signed or initialed, actually negotiated, entered into between two sophisticated parties, in a situation where there is no severe power imbalance between the parties. Thus, as in litigation, it can be expected that courts would typically uphold clauses that are part of commercial transactions between two relatively sophisticated parties. It can also be anticipated that courts would uphold clauses actually negotiated between high level employees and their employer, particularly where such high level employees were represented by counsel.

In contrast, the clauses most likely to be voided would be those imposed on unsophisticated consumers or employees, particularly where the clause was merely contained in an envelope stuffer, employee handbook, or warranty booklet, that did not even require a signature or initialing.²⁷⁴ Courts would also be more likely to void those clauses that were relatively inconspicuous, that were imposed on persons who lacked a real opportunity to negotiate, or that were accompanied by misleading verbal explanations.

Does this mean that companies could never use contracts of adhesion to enter pre-dispute arbitration agreements with consumers and employees who would otherwise have had a jury trial in claims at common law brought in federal court? It will likely depend on the specific circumstances under which the arbitration clause is introduced. The "in between" cases would be left to the discretion of the courts, as they currently are in the contractual jury waiver context. For example, courts would likely split on whether they should approve or disapprove a clear but not particularly conspicuous binding arbitration clause imposed on a relatively sophisticated consumer or employee in a contract of adhesion that required a signature. Some judges would see such a clause as knowing and voluntary, and others would not. While some might protest such a result as unduly arbitrary and uncertain, it is

employees actually understand the meaning of the arbitration clause that they are asked to sign, and that doing so "need not be unduly burdensome").

²⁷⁴ Precisely such a distinction was drawn by the Connecticut Superior Court in *Norton v. Commercial Credit Corp.*, No. CV 98-0578441-S, 1998 WL 729700 (Conn. Super. Oct. 6, 1998). That court refused to enforce an arbitration clause contained in a company employment handbook, where the employee earned just \$10 per hour, where the arbitration clause did not clearly state that it constituted a jury trial waiver, where the employee was not represented by counsel and had no chance to negotiate, and where the district manager informed her that her signature was merely an acknowledgment of receipt of the documents. The court distinguished *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748 (Conn. 1998), in which the Connecticut Supreme Court held that jury trial waivers contained in commercial contracts were prima facie evidence of intentional waiver, on the ground that commercial and non-commercial contracts are different. *Norton*, 1998 WL 729700, at *4.

precisely the approach already being taken with contractual jury trial waivers. It is consistent with the Supreme Court's recognition that the viability of waivers is often highly fact specific.²⁷⁵

Applying the jury trial waiver analysis would also accomplish several other changes. First, at least in disputes covered by the Seventh Amendment courts would cease using the "arbitration is favored" verbiage to interpret arbitration clauses more broadly than may have been intended by the parties, or to eliminate potential defenses.²⁷⁶ Instead, they would be sure not to infer lightly the existence of an arbitration clause, where the arbitration clause would impinge on a Seventh Amendment right.²⁷⁷ Second, and relatedly, where the coverage of an arbitration clause is ambiguous courts would interpret the clause narrowly, rather than broadly.²⁷⁸ Third, in many jurisdictions courts would require proponents rather than opponents of an arbitration clause to carry the burden of showing that the clause was entered knowingly, voluntarily and intelligently.²⁷⁹

In sum, applying the Seventh Amendment would still permit persons who prefer arbitration to litigation to elect that option, knowingly and voluntarily, but would prohibit companies from using arbitration to take advantage of unknowing consumers, employees, or other "little guys." This result is desirable, from a policy perspective.²⁸⁰

B: Requiring that Arbitration Be Elected "Knowingly, Voluntarily, and Intentionally" Is Consistent with the Original Policy Underlying Passage of the Federal Arbitration Act

As I have argued elsewhere, the Federal Arbitration Act was never intended to permit companies to impose arbitration on unknowing consumers and employees, but rather was merely intended to allow two sophisticated

²⁷⁵ See, e.g., *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) ("[O]ur holding, of course, is not controlling precedent for other facts of other cases."); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating waiver of right to counsel depends on analysis of specific facts and circumstances).

²⁷⁶ See *supra* text accompanying notes 131–39.

²⁷⁷ See *supra* text accompanying notes 34–39.

²⁷⁸ Compare *supra* text accompanying notes 102–08, with *supra* text accompanying notes 186–87.

²⁷⁹ Compare *supra* text accompanying notes 99–101; with *supra* text accompanying notes 182–85.

²⁸⁰ See Schwartz, *supra* note 3, at 56–58 (urging courts to cease enforcing arbitral contracts of adhesion); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 310–13 (1999); Sternlight, *supra* note 132, at 647.

businesses to enter into pre-dispute arbitration agreements.²⁸¹ The legislative history of the Act is filled with discussions of how businesses need to be able to enter into enforceable arbitration agreements with one another.²⁸² In contrast, while companies in 1924 did not customarily seek to impose contracts of adhesion on a widespread basis, the FAA's legislative history does reflect legislators' concern that arbitration not be imposed through non-negotiable contracts of adhesion in the employment or insurance context.²⁸³ Thus, applying the Seventh Amendment to arbitration would not undercut the policy underlying the FAA, but would instead support it.

C. Recognizing the Relevance of the Seventh Amendment in Some Cases Would Not Require Reversal of the Holding of any Extant Supreme Court Precedents

As the Court has never considered the relevance of the Seventh Amendment to arbitration, it has never held that arbitration clauses are for any reason exempt from its coverage. *Gilmer* held that parties could agree to arbitrate ADEA claims, and found that a particular registered securities representative had so agreed.²⁸⁴ However, *Gilmer* did not examine whether the Seventh Amendment required the agreement to be knowing, voluntary and intelligent. *Casarotto* held that a Montana statute providing that arbitration clauses be presented in a particular conspicuous fashion was preempted by the FAA, and thus found that a franchisee could be compelled to arbitrate under a clause that did not comply with the statutory requirement.²⁸⁵ However, *Casarotto*, a case brought in state court,²⁸⁶ understandably did not consider whether the Seventh Amendment might require conspicuousness in certain cases. Similarly, although *Terminix*²⁸⁷ found that consumers could be compelled to arbitrate, based on an adhesive contract, in that the state statute prohibiting pre-dispute arbitration clauses

²⁸¹ See Sternlight, *supra* note 132, at 647. See also Harding *supra* note 215; Stone, *supra* note 215.

²⁸² Sternlight, *supra* note 280, at 311.

²⁸³ See Sternlight, *supra* note 280, at 311–13. See also Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 930–32 (Cook, J. concurring) (reviewing legislative history of FAA and asserting that it illustrates that arbitration was not intended to allow the elimination of jury trials through involuntary or adhesive contracts). Nor did *Circuit City* address this issue when it held that the FAA's employment exclusion should be interpreted narrowly. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).

²⁸⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

²⁸⁵ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

²⁸⁶ *Id.*

²⁸⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

was preempted by the FAA, again the Court did not consider whether the customers had a protected jury trial right. As in *Casarotto*, the Seventh Amendment likely would have been found inapplicable had the Court considered it in *Terminix*, in that the original action was brought in state court.²⁸⁸ Thus, while some lower courts and commentators have interpreted the Supreme Court's arbitration decisions to be a ringing endorsement of mandatory arbitration, even absent a knowing, voluntary, and intelligent agreement to arbitrate, in fact the issue has never been addressed.

D. How Would the Gilmer Case Have Come Out if the Court Had Applied a Seventh Amendment Analysis?

It is illustrative to consider what would have happened if the courts had applied a jury trial waiver analysis in the *Gilmer* case itself. The first question that would have had to have been addressed was whether or not Mr. Gilmer was bringing a claim at "common law" that was protected under the Seventh Amendment. At the time *Gilmer* was decided it was unclear whether claims under the ADEA gave rise to a Seventh Amendment jury trial right. Although the Supreme Court had decided that a *statutory* jury trial right did exist under the ADEA,²⁸⁹ such a statutory right is not necessarily governed by the constitutional standards set forth above, and the Court did not reach the Seventh Amendment issue.²⁹⁰

It is certainly possible courts might have concluded that claims under the ADEA gave rise to a Seventh Amendment jury trial right. While the ADEA did not exist, at common law, a court might well have concluded that because the type of relief afforded by the statute was "legal," the action was sufficiently similar to a common law claim that it should entitle parties to a jury trial.²⁹¹

Assuming Mr. Gilmer had a Seventh Amendment right to a jury trial, did he waive it knowingly, voluntarily, and intelligently? First, examining the negotiability of the clause, the Court recognized that Gilmer was required to register as a securities representative with several stock exchanges, and that these applications included an agreement to arbitrate all disputes required to

²⁸⁸ *Id.* at 268–69.

²⁸⁹ *Lorillard v. Pons*, 434 U.S. 575, 577, 585 (1978) (holding that there was a statutory right to a jury trial under the ADEA, even prior to addition of explicit right in §626(c), but failing to address whether the Seventh Amendment would also require that a jury trial be available for claims brought under the ADEA).

²⁹⁰ *Id.* at 577.

²⁹¹ See *supra* text accompanying notes 19–20.

be arbitrated by the rules of the various exchanges.²⁹² It seems this application was neither negotiated nor subject to negotiation.

Second, with regard to conspicuousness and disparity of bargaining power, while the Supreme Court opinion does not provide a great deal of detail, it reveals a few facts that could be used to challenge the waiver. The decision does reveal that Mr. Gilmer was not provided with clear information regarding the scope of the arbitration clause. His registration application stated that he agreed to resolve those disputes "required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register."²⁹³ The Court did not state, however, that Mr. Gilmer was actually provided with a copy of the New York Stock Exchange Rule providing for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment of such registered representative." (alteration in original)²⁹⁴ Thus, it appears the complete provision was far from conspicuous. Regarding disparity of bargaining power, the Court makes no finding, but it does not reject Mr. Gilmer's claim that there was a disparity of bargaining power between employer and employee.²⁹⁵

One factor supports upholding the waiver. In terms of business and professional experience, the Court finds that Mr. Gilmer was "an experienced businessman."²⁹⁶

Thus, although the last factor supports waiver, most of the factors lead to a conclusion that Mr. Gilmer did not knowingly, voluntarily, and intelligently waive his jury trial rights. Particularly in those jurisdictions that place the burden of proof on the party supporting waiver, it is likely that if Mr. Gilmer could have established a Seventh Amendment jury trial right, he could have defeated the arbitration clause. In short, although the holding of *Gilmer* would continue to stand, a new case with identical facts to *Gilmer* might come out differently under a Seventh Amendment analysis.

VI. CONCLUSION

The Seventh Amendment right to a jury trial has been a fundamental part of our Constitution since 1791. Although the right is waivable, such waivers must be genuine; specifically, they must be knowing, voluntary, and

²⁹² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 33. Instead, the Court states: "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33.

²⁹⁶ *Id.* at 33.

intelligent. Companies cannot legitimately evade this strict constitutional requirement by using arbitration clauses. Instead, when an arbitration clause is being used to deny persons the Seventh Amendment jury trial right they otherwise would have had, it is unconstitutional for courts to enforce such a clause.

Some may protest this result, asserting that binding arbitration is a better mode of dispute resolution than is the jury trial, and that it is more desirable and cheaper for all concerned. While I remain unconvinced that this is true,²⁹⁷ it is also fundamentally irrelevant. Whatever the arguable benefits of binding arbitration over litigation, our Constitution states that jury trials are to be preferred over arbitration.

Thus, those persons who would rather resolve their disputes through binding arbitration, than by jury trial, have two simple choices when the disputes are covered by the Seventh Amendment. First, they may secure their opponents' knowing, voluntary and intelligent waiver of the jury trial right. Alternatively, they may secure an amendment to the U.S. Constitution that limits the scope of the Seventh Amendment. Absent such an amendment, neither private companies nor any court can legitimately use binding arbitration to obliterate the Seventh Amendment.²⁹⁸

²⁹⁷ Sternlight, *supra* note 132, at 674–97. In those circumstances where binding arbitration is truly better and cheaper for all it can be agreed to, knowingly and voluntarily. Mandatory arbitration is not needed.

²⁹⁸ Professor Ellen Sward makes a similar argument to mine, in a related context. Discussing the increasing use of legislative courts, which do not provide for juries, Sward suggests that such courts are often violative of the Seventh Amendment. *See* Sward, *supra* note 8. In her conclusion, she states the following:

I am well aware that many members of the legal profession do not have a favorable opinion of the jury and that the arguments I have made here will seem like heresy to them. I am concerned, however, that the right to a jury trial is eroding before our eyes and that we seem neither to recognize it nor to care. . . . Neither neglect nor habit should be permitted to serve as a convenient rationalization for the deterioration of a fundamental constitutional right.

Id. at 1142. Sward also points out that "[w]hile efficiency and expertise are the values that Congress seeks to effectuate by creating legislative courts, those values are irrelevant if legislative courts are unconstitutional." *Id.* at 1062–63. The parallels are clear. *See also* Curtis v. Loether, 415 U.S. 189, at 198 (1974) (holding that policy arguments suggesting that jury trials may bring delay or risk prejudice "are insufficient to overcome the clear command of the Seventh Amendment").

